(33,984)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 675

HARRY J. KIRK, AS SUPERINTENDENT OF PUBLIC WORKS AND DIRECTOR OF THE DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS OF THE STATE OF OHIO, ETC., ET AL., APPELLANTS,

vs.

THE PROVIDENCE MILL COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 27, 1929

of Ohio and as such has jurisdiction and control over the lands and ways belonging to said State and used or intended to be used by said State as public highways, including the Miami & Erie Canal lands hereinafter mentioned and described and extending from the Maumee sidecut of said canal, at the Village of Maumee, Ohio, northwesterly to the [fol. 2] Maumee River, at the point where said Miami & Erie Canal joins said Maumee River; that defendant Richard D. Wisda is the duly appointed, qualified and acting Superintendent and Director of the Department of Public Works of the State of Ohio and as such Superintendent and Director has custodial care and management, with power to lease and sell, the public lands and waters of any and all kinds belonging to said State of Ohio, including the canal lands and canal waters of that portion of said Miami & Erie Canal above described; that the defendants, Roy E. Davis, Ralph E. Farnsworth and George R. Hoffman are the duly elected, qualified and acting County Commissioners of Lucas County, Ohio; that all the defendants are citizens of Ohio, resident within the jurisdiction of this court in this case, the defendant George F. Schlesinger residing within the Southern District of Ohio at Columbus in Franklin County in said State, and defendant Richard D. Wisda residing at the City of Defiance in Defiance County, Ohio, and said Roy E. Davis, Ralph E. Farnsworth and George R. Hoffman, residing in Lucas County, Ohio, in the Western Division of the Northern United States Judicial District of Ohio.

2. The matter in controversy in this suit exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3000.00) and arises under the Constitution of the United States of America.

3. On November 24, 1827, one, Peter Minor, acquired title to and became the owner of a section of land containing six hundred forty-three (643) acres lying and abutting on and along the north side of the Miami, now Maumee, River at the Wolfe, now Grand, Rapids, bounded and described as follows:

Begining at a white oak sixteen (16) inches in diameter, on the north bank of the Miami (now Maumee) River, from which a white oak sixteen (16) inches in diameter bears

north forty-five (45) degrees west, distant fourteen (14) links; thence north eighty (80) chains to a post from which a white oak twenty (20) inches in diameter bears north [fol. 3] sixteen (16) degrees west, distant twenty-three (23) links, and an elm sixteen (16) inches in diameter bears south twenty-five (25) degrees east, distant fifty-five (55) links; thence east eighty (80) chains to a post from which a white oak twenty (20) inches in diameter bears north eighty-eight (88) degrees west, distant sixty-eight (68) links; thence south eighty-eight (88) chains, sixty (60) links, to a post on the north bank of the Miami (now Maumee) River; thence up the river with the meanderings thereof to the place of beginning.

4. The State of Ohio beginning with the year 1825 provided for the construction of and thereafter constructed what, since the year 1849, has been known as the Miami & Erie Canal, extending from the Ohio River through and from the City of Cincinnati, Ohio, northerly to and through the Cities of Dayton and Defiance, Ohio, and northeasterly from the west line of the State of Ohio through said City of Defiance, Ohio, along the northerly side of or on the Maumee River into and through the City of Toledo, Ohio to Lake Erie; that said canal was so constructed in three sections, the first section of which was completed about the year 1834, known as the Miami Canal and extending from the Ohio River to the City of Dayton, Ohio, the second section of which was completed about the year 1845, known as the Miami Extension Canal and extending from the City of Dayton, Ohio, northerly to the mouth of the Auglaize River at the City of Defiance, Ohio, and the third section of which was begun in the year 1837 and completed in the year 1842, known as the Wabash & Erie Canal and extending from the west state line of the State of Ohio northeasterly to and through said City of Defiance, Ohio, there connecting with said Miami Extension Canal and extending on northeasterly along or on the Maumee River on the north side thereof to and through the City of Toledo, Ohio, to Lake Erie. Said Wabash & Erie Canal was constructed along the north bank of said Maumee River and northeasterly from said City of Defiance, as aforesaid, for a distance of about twenty (20) miles, at which point said canal emp-

tied into said Maumee River and from thence on northeasterly said Maumee River formed a part and was used as a part of said canal for a distance of about twenty (20) miles to said Village of Grand Rapids, Ohio. At a point opposite said Village of Grand Rapids, Ohio, and on the north bank of said Maumee River said canal was connected with said river and constructed on northeasterly along and near the [fol. 4] north bank of said river through the Villages of Waterville and Maumee and to and through the City of Toledo as aforesaid.

5. The General Assembly of Ohio, by Act duly passed in the year 1849, provided that said above mentioned canals should thereafter constitute one canal and be known and designated by the name of the "Miami & Erie Canal"; that said canal has been completed and in operation for a period of about eighty-six (86) years and under the laws of Ohio was so constructed and completed and has been operated through a portion of the time since such construction for the purpose of navigation thereon by various kinds of canal boats and throughout all of said time for the further purpose of supplying water for hydraulic purposes to industrial plants, hydro-electric plants, mills and for other industrial purposes, said water being furnished by said State of Ohio for such purposes to users of such water along the line of said canal under leasing or sale contracts of stated periods providing for the payment of compensation in money and other considerations to the State of Ohio and under perpetual grants made by said State of Ohio to users of such water upon valuable considerations.

There has been no commercial navigation on that part of said canal between the Village of Grand Rapids and the City of Toledo, Ohio for about thirty (30) years last past.

6. Upon the acquirement by said Peter Minor of said section of land, as hereinabove described, and long prior to the beginning by the State of Ohio of the construction of said Wabash & Erie Canal, now said Miami & Erie Canal, on the north bank of said Maumee River opposite said Village of Grand Rapids, Ohio, as aforesaid, said Peter Minor constructed a dam across said Maumee River from the north shore of said river and on his said land southerly to the south shore of said river, for the purpose of storing

water above said dam to be used for hydraulic purposes in the operation of flour, feed and saw mills, as hereinafter mentioned; that at the same time said Minor constructed below and northeasterly from his said dam on the north shore of said river and on his said land a saw mill to be operated by water power through water to be drawn from the said Maumee River from above said dam through a [fol. 5] mill-race running from said river about said dam to and through said mills; and that at said time said Minor constructed a mill-race connected with said Maumee River above said dam and running northeasterly along the north shore of said river and on his said land to his said mill and thereafter for several years prior to the beginning of the construction of said Wabash & Erie Canal, as aforesaid, the exact number of years being to plaintiff unknown, said Minor used said dam and mill-race on his said land as aforesaid by carrying water from above said dam through said mill-race for and in the operation of said mill by hydraulic power thus provided.

7. Subsequent to the construction by said Peter Minor of his said dam, mill-race and mill, the State of Ohio, in the year 1837 began, and thereafter completed the construction of said Wabash & Erie Canal on the north bank of said Maumee River, as aforesaid, connecting the same with said Maumee River at the point at or near where said Minor's mill-race connected with said river on his land and said State of Ohio constructed said canal northeasterly along said Maumee River on said Minor's said land and therein used said Minor's mill-race throughout the length thereof, tore down and destroyed said saw mill and constructed said canal on northeasterly along the bank of said river to the City of Toledo as aforesaid.

For the purpose of storing and furnishing water for the operation of said canal, the State of Ohio constructed a dam across said Maumee River at a location below the location of Minor's said dam and so constructed said dam and said canal that said Minor's water powers, provided and used by him as aforesaid on his said land, were entirely destroyed, and this without first compensating him in any way for his loss and damage suffered thereby; and further without compensating him in any way for the loss of his land occupied by said canal as aforesaid.

Said dam, constructed as aforesaid by the State of Ohio, has been reconstructed from time to time by said State and continuously from its first construction in 1842 has been maintained at its present location and is known as the Grand Rapids, Ohio, State Dam. It is built of concrete, [fol. 6] indestructible by use or wear, running from the north shore of said Maumee River southerly to the south shore of said river, about twelve hundred (1200) feet long and twelve (12) feet high and it thus extends across said river between the Village of Providence (unincorporated) on the north shore of said river in Lucas County, Ohio, and the Village of Grand Rapids, on the south shore of said river in Wood County, Ohio. Said canal connects with said river just above and southwesterly from said dam and extends therefrom northeasterly as aforesaid on the north shore of said river a distance of about one-half mile to and through what is known as the Guard Lock, or Lock No. 9, on said Miami & Erie Canal at said Village of Providence, Ohio, and from there on northeasterly along said Maumee River to the City of Toledo as aforesaid.

Said State Dam was constructed by the State of Ohio at a cost of at least Two Hundred Fifty Thousand Dollars ($250,000.00) and above it is stored a pool of water in said river practically continuously of the width and depth respectively of said dam and for a distance up said river of about eighteen (18) miles.

It would not be practical nor of any benefit to the State of Ohio or the public to devote the land occupied by said canal to any other use than as said canal from the point where it connects with the Maumee River as aforesaid to a point northeasterly from said Guard Lock a distance of about six hundred (600) feet.

Said Guard Lock, or Lock No. 9, was constructed by the State of Ohio as a part of said Wabash & Erie Canal prior to 1842. It was and is built of stone and except as to its gates regulating the in-flow and out-flow of water, is indestructible by use or wear.

8. To adjust in part the damage to which said Peter Minor was entitled for the destruction of his saw mill and other property as aforesaid and to compensate for his land occupied by the State of Ohio in the construction of said canal, guard lock and dam as aforesaid, said Peter Minor

and the State of Ohio (said State of Ohio acting through R. Dickenson, Acting Commissioner and Member of the Board of Public Works of said State, thereto duly author-[fol. 7] ized by law and by order of said Board made in pursuance thereof) entered into an agreement on September 1, A.D., 1842, in which the State of Ohio was designated as "Party of the First Part" and said Peter Minor was designated as "Party of the Second Part." By this agreement first party (State of Ohio) expressly in consideration of the releases, quit claims and covenants of second party (Minor) contained therein and upon condition that second party should continue to comply with the limitations, conditions and covenants contained in the agreement and perform the stipulations by him to be complied with and performed, did sell and convey to second party and to his heirs and assigns forever, subject to the limitations and conditions contained in the agreement, a sufficient quantity of water properly applied to propel eight (8) pairs of four and one-half (4½) feet millstones, with all the labor saving machinery necessary for the manufacture of superfine flour, to be applied at all seasons of the year, except when necessary for the navigation of said canal and except when breaches might occur, repairs become necessary or other unavoidable causes might prevent such supply. It was further provided in said agreement that nothing therein contained should hold the State of Ohio responsible to furnish said amount of water, or any part thereof, to second party, to the damage and injury of mill owners and proprietors of water power on the Maumee River at, opposite and below the towns of Providence and Gilead, and said agreement and grant was entered into and made upon the following express terms, provisions, covenants and conditions:

"The water hereby leased for six of the said pairs of millstones and their appertaining machinery, is to be taken from the Wabash and Erie Canal at and immediately above the Guard Lock, being Lock No. Nine, on said Canal and near the town of Providence on the North Side of said Canal by means of suitable regulating Gates, and to be discharged into the Canal below said Guard Lock, by means of a suitable regulating weir, to be constructed in a safe, substantial

and workmanlike manner, by and at the expense of the party of the first part, as hereinafter specified.

The water for the remaining two pairs of millstones, and their appertaining machinery, is to be taken from the said Canal on its South Side; and from the level immediately above said Guard Lock by means of a regulating weir, to be constructed by and at the expense of the party of the second part, as hereinafter specified.

[fol. 8] And the said party of the second part, for and in consideration of the right to the use and occupation of said water, leased and conveyed as aforesaid, hereby releases, conveys and forever quit claims to the State of Ohio, and to her assigns forever, all right, title and interest, claim and demand of every kind whatever, against said State of Ohio, for the use and occupation of the water from the Maumee River—for the occupation of all lands used and appropriated in the construction of the Wabash and Erie Canal and its appurtenances, for the occupation of all mill sites of the party of the second part, and for the destruction or injury of and to all mills, dams and mill races, and all other property either personal or real, which has been damaged, injured or destroyed in consequence of the construction of the said Wabash and Erie Canal; excepting only the right to claim and receive an assessment of damages for the destruction of a saw mill, the property of the party of the second part, which stood on ground now occupied by said canal.

And the said party of the first part hereby agrees, that the said State of Ohio shall erect and complete within eighteen months from the date hereof at the expense of the said State, in a secure, substantial, and workmanlike manner, and keep in good repair, the regulating Gate, and weir above mentioned, to be constructed by the State, and to construct the same of stone walls of solid masonry and suitable timber and iron with the necessary embankments, agreeably to a place to be furnished by the Acting Commissioner or Engineer employed in said Canal or any adjoining portion thereof; and under the direction and subject to the inspection of such Acting Commissioner or Engineer; The gates through which the water is to be drawn from the Canal to be so placed and formed that, together with the weir below, they may at all times be

readily made to secure a uniform and regular flow of water from the upper to the lower levels of the Canal according to the pleasure and discretion of the Acting Commissioner or Engineer, whether the hydraulic works are in operation or not.

And the said party of the second part further agrees to erect, complete and keep in good repair the regulating weir on the South side of the Canal, to be constructed of stone walls and plates of wood, with a substantial iron bar securely bolted on the top thereof, agreeably to a place to be furnished by the acting Commissioner or Engineer employed on said Canal, or on any adjoining part thereof, and under the direction and subject to the inspection of such Acting Commissioner or Engineer; or to erect instead of the said weir, such feeder gate or gates, according to a plan to be furnished, as above, the work and material of which are to be approved as above; and said gates when so constructed shall be under the control and management of such Acting Commissioner or Engineer. The weir or lower sill of the feeder gates over which the water is to pass from the Canal is to be so placed and formed that the top of the weir or lower sill of the feeder gates shall not be more than six inches below the level at which it shall be designed to sustain the surface of the water in that part of the canal from whence the water is to be drawn. The said feeder gate or gates are to be so situate so constructed that any duly authorized agent of the state of Ohio may conveniently stop all the water from flowing through them, and that the quantity of water at any time to flow through them may conveniently be regulated in accordance with the intention of the parties to these presents and the description and direction of the Acting Commissioner or Engineer; the full right to direct, manage and control which, is hereby expressly reserved to the State of Ohio.

[fol. 9] And it is further expressly agreed that the party of the second part shall not, for any purpose, or in any manner whatever, obstruct the equal and regular flow of water from one line of the canal to another, nor increase the flow, nor cause the water or any part thereof, to flow out of the canal, except as hereinbefore provided; nor shall the party of the second part permit any of said acts or things to be done by any person or persons employed in

or about the mill or hydraulic works propelled by water hereby leased; and the said party of the second part shall be considered and held responsible for keeping the head races and regulating gates and weirs to be by him erected as above described, constantly in good repair and free from all obstructions; and a failure to do so or any interference with the flow of the water on their part, or on the part of any other person employed in or about said mills or hydraulic works aforesaid, shall be adjudged and is hereby agreed to be determined a suspension of this lease, and of the rights and privileges of said party of the second part, growing out of this agreement, until the said party of the second part shall have paid to the proper Agent of the State of Ohio, all and singular the damages and costs of repairs which may have resulted from such failure or interference and furthermore have fully complied with these covenants.

And when at any time by the carelessness, neglect, or interference with the flow of water by the party of the second part or others in his employ, there shall occur any breach in the bank, the formation of a bar or other injury to the Canal, and also in case of the occurrence of any such injury or injuries in consequence of an unfaithful or unsubstantial construction of any of the weirs, gates, embankments or other works to be constructed by the party of the second part, or in consequence of such said works being out of repair; then said party of the second part shall, on being notified thereof by said Acting Commissioner, Engineer or other proper Agent of the State, immediately repair said breach or other injury, or if such Agent of the State shall cause the same to be done (which he is hereby authorized at his option to do) then, said party of the second part shall pay to the said Agent, all the necessary expenses incurred in repairing such breach or other injury on demand.

And it is further understood and agreed that the water power hereby leased, or conveyed, shall not be used to drive or propel any mill or other machinery or works, from which saw dust chips or other rubbish will be likely to be carried, thrown or floated into the Canal, so as to form obstructions to the navigation thereof, or to clog the gates, waste or regulating weirs, or otherwise injure or obstruct

the same. And the said party of the second part shall at all times be bound to keep the canal clear of all rubbish, or other obstructions consequent in any manner, on the use of the water hereby leased, and of the works and machinery erected therefor.

And if the party of the second part shall in any respect fail to fulfill and perform all the engagements of the said party hereinbefore expressed, or shall do, or permit to be done any act or thing, hereby prohibited, or shall in any respect violate this agreement, then and in either case, all the rights and privileges derivable to said party of the second part from this agreement, shall from the time of such violation, cease and determine; until by some competent judicial judgment or decree such rights and privileges shall be duly restored; and any authorized agent of the State, shall have full power to enter upon and take possession of the premises, and resume all the rights and privileges hereby granted to the party of the second part, and hold the same until otherwise determined by a court of [fol. 10] competent jurisdiction; and the said party of the second part shall moreover be liable for all damages consequent upon such violation of this agreement.

And it is further understood and agreed by the parties to this agreement that the head of water to be used by the party of the second part as aforesaid to propel the six pairs of millstones on the North side of said Canal, is not to be less than four and a half feet, measuring from the surface of water above said Lock to the surface of water in Canal below the lock. And that the power for said two pairs of millstones to be used on the South side of said Canal is to be so used to propel saw mills and is only to be used when there is a surplus of water in the Maumee River, after supplying the Canal with water sufficient for the purposes of navigation and for all mills and other hydraulic works that have been or may be hereafter leased from said State of Ohio. And it is further agreed that the regulating weir to regulate the flow of water from the Canal to the saw mill on the South side of the Canal as aforesaid, shall be constructed at the expense of the party of the first part, instead of the party of the second part as aforesaid, but ever thereafter to be kept in good repair by and at the expense of the second party."

9. After the execution and delivery of said above described agreement and grant under date of September 1, 1842, an award of Twenty-five Hundred Dollars ($2,500.00) was made and paid by the State of Ohio to said Minor for the loss of said saw mill, but the State of Ohio failed to deliver to said Minor from said canal on the north side thereof sufficient water to run six (6) pairs of four and one-half (4½) feet millstones and in fact delivered only enough water to run one and one-half (1½) pairs of millstones. Thereupon and prior to February 10, 1846, said Minor made claim against the State of Ohio for further adjustment under his said agreement of September 1, 1842, and on February 10, 1846, the General Assembly of the State of Ohio adopted a resolution which provided—

"that the Board of Public Works are hereby authorized to examine the claim of Peter Minor, for the nonperformance of a certain contract entered into by R. Dickinson, Acting Commissioner of the Board of Public Works with the said Minor, on the first day of September, one thousand eight hundred and forty-two, and all other matters in dispute between the State and the said Minor, and that they report to the Commissioners of the Canal Fund any further sum which they may find due him, provided that the said Minor shall, before the investigation of his claim, execute and deliver to the said Board a full and final release to the State of all further claims of any description, except so much as may be awarded to him by said Board under this resolution."

Upon the adoption of said resolution by the General Assembly of Ohio as aforesaid, said Board of Public Works examined the claim of said Minor relative to the non-[fol. 11] performance by the State of Ohio of said agreement of September 1, 1842, and thereupon made a finding and ordered on February 23, 1846, first, that the power created by the water discharged around the Guard Lock near the Town of Providence estimated at one and one half (1½) millstone power, be the same more or less, should be possessed and enjoyed by said Peter Minor for his own proper use under the limitations and restrictions imposed for the use of the water for the six (6) millstone power provided for by said contract of September 1, 1842; and, second, that said Minor should be allowed a further sum of

Twenty-eight Hundred Dollars ($2800.00) which, with the water for the two (2) pairs of millstones stipulated to be taken from the south side of the canal in the contract of September 1, 1842, should be in full liquidation of all claims for damages of all and every kind sustained by said Minor in the location and construction of said canal and its appurtenances either reserved in said contract of September 1, 1842, or growing out of any failure on the part of the State to fulfill the conditions and stipulations in said contract or for the apropriation of the water of the Maumee River claimed by said Minor for hydraulic purposes, and also in payment of a piece of land not exceeding one (1) acre, situated on the north side of said canal, claimed by the Acting State Commissioner as necessary for the erection of a lock house, for which piece of land said Minor agreed to execute a conveyance to the State in fee simple.

Said finding and order was made and entered by said Board of Public Works upon and after said Minor had filed with said Board a written and duly executed final release of his claims against the State of Ohio, in which release said Minor did release, remise and forever quit claim to the State of Ohio all his right, title and interest, estate and claim in and to the ground occupied by said canal and its appurtenances and the easement necessary for the navigation thereof; and to all claims of damages for loss of water and other losses of every kind resulting from the construction of said canal and appurtenances along, through and over the premises and land owned by him and also on account of the inability of said State to supply the [fol. 12] full amount of water power provided for in said agreement of September 1, 1842; and said written release further stipulated that said Minor did reserve as compensation in part for losses resulting from said deficiency in the quantity of water leased, any and all of the water which might pass around the Guard Lock from the level of the pool of the dam to the canal below the lock, together with the two (2) pairs of millstone power, as provided for him to receive in said agreement of September 1, 1842. Said release was accepted by the State of Ohio and thereafter said State paid to said Minor said additional sum of Twenty-eight Hundred Dollars ($2800.00).

Said Minor, prior to the construction of said canal and in the exercise of his riparian rights as the owner of said

land hereinabove described, had used water from said Maumee River from above his said dam, drawing the same through said mill-race constructed by him, as aforesaid, in operating his said saw mill which was located at a point on said Maumee River on his said land and just south of and adjacent to said Guard Lock, or Lock No. 9, constructed by the State of Ohio, as aforesaid, as a part of said canal; and through said agreement and grant of September 1, 1842 and said release executed by him, said Minor reserved to himself and his heirs and assigns forever, the right to take from said canal for hydraulic purposes from just above said Guard Lock an amount of water sufficient to operate three and one-half (3½) pairs of four and one-half (4½) feet millstones and it was provided under and through said agreement and release that said Minor, his heirs and assigns, should forever be entitled to draw said water from said canal at said location as a part of the compensation to be made to him by said State of Ohio, for the occupation of his lands and his water power theretofore enjoyed by him, and to restore to said Minor, his heirs and assigns forever, his rights unimpaired as a riparian owner in the use of said water and water power for hydraulic purposes.

Said water power was used by said Minor from his said mill-race and it still is used by his successors in interest hereinafter mentioned from said canal on the south side thereof at a head or fall of from ten (10) to twelve (12) feet and developed and still does develop a water power of about two hundred twenty-five (225) horse power and is [fol. 13] of a value in excess of Seventy-five Thousand Dollars ($75,000.00).

10. About fifty (50) years ago one, Serrick, became the owner of said water power through conveyances thereof from said Peter Minor and his assigns and said Serrick also in the same manner became the owner of the land lying south of said canal, north of and on the bank of said Maumee River and adjacent to said Guard Lock, or Lock No. 9, of said canal, and erected thereon a flour mill to be operated by means of said water power; that said flour mill has since its erection, as aforesaid, been owned and operated by said Serrick and his successors in interest by means of said water power drawn from the south side of said canal,

all with the knowledge and consent of the State of Ohio, and this under and in compliance with the terms and conditions of said contract and grant of September 1, 1842 and the readjustment thereof as set forth hereinabove; that in 1922 The Defiance Gas and Electric Company an Ohio corporation, became the owner of said grant, said flour mill and the lands whereon said mill stands and the lands in connection therewith, together with all the rights and privileges provided for in said agreement and grant of September 1, 1842 to said Peter Minor, his heirs and assigns; that in 1922 said The Defiance Gas & Electric Company, being then the owner of said grant and property, did lease to the plaintiff herein, The Providence Mill Company, for a period of years ending December 19, 2004, said mill and all the equipment thereof and the lands on which it stands, together with the right under said grant to take from said canal sufficient water to be used through said mill on the south side of said canal immediately above said Guard Lock No. 9 to turn one turbine water wheel not exceeding four (4) feet in diameter and not exceeding two (2) feet high for not exceeding ten (10) hours per day during the term of said lease, said amount of water being about the amount of water called for by said grant and said readjustment releases and agreements hereinabove described between the State of Ohio and said Peter Minor; that said water lease so acquired by this plaintiff is of very great value because of the fact that through it this plaintiff is furnished with a water power for the operation of its mill at a cost and expense in generation of power for its mill far below what the cost and expense is or would be in [fol. 14] the generation of power through means of steam plants in the use of coal or other means; that the cost and expense in the upkeep and operation of plaintiff's mill is constant and not subject to all the varying changes and increase of prices in the cost of coal and the depreciation of machinery operated through means of coal or otherwise in furnishing power for plaintiff's business, and plaintiff says that there is no other source of water supply available to plaintiff for the operation of its business aside from the water obtained through said lease under said perpetual grant from the State of Ohio as aforesaid.

11. Plaintiff further says that on the 11th day of May, 1927, the General Assembly passed an Act, being Senate Bill No. 48, over the Governor's veto, providing for the abandonment of a portion of the Miami & Erie Canal for both canal and hydraulic purposes, commencing just below the head of the Maumee side-cut near Maumee, Ohio, thence southwest over and along said canal, including the full width of the bed and banks thereof as defined by Buchanan's survey, to a point where said canal joins the Maumee River on the westerly side thereof in Providence Township, Lucas County, Ohio. Said Act provides that all leases granted to any person, firm or corporation, for canal or hydraulic purposes shall become null and void on and after sixty (60) days from the taking effect of said Act, and that the abandoned portion of said canal shall be under the supervision and control of the State Highway Director to be devoted to highway and park uses and the Director of Highways is authorized and directed to drain the water from said abandoned portion and prevent the water of the Maumee River from flowing into or through said abandoned part of said canal within sixty (60) days from the taking effect of said Act. Said Act further provides that the County Commissioners of Lucas County, Ohio, shall be authorized to drain the water from the abandoned portion of said canal and to prevent the water from the Maumee River from flowing into or through said abandoned portion of said canal. Said Act took effect August 10, 1927.

Said defendants threaten to and will, unless restrained therefrom by this court, drain the water from the portion of said canal so abandoned and will prevent the water from the Maumee River from flowing into and through the portion of said canal so abandoned and thus take away [fol. 15] from the plaintiff all of said water, as called for by its lease from said The Defiance Gas & Electric Company under said grant from the State of Ohio to ePter Minor, and totally deprive plaintiff of the same without compensating or paying plaintiff in any wise for the same and without making any provision in any wise for the continuance of the flow of said water nor any part thereof to plaintiff's said mill.

12. Plaintiff further says that if the defendants shall be allowed to take such action as hereinabove described, plain-

tiff's said mill and its business in connection therewith and conducted through the same by means of said water power will be totally destroyed and ruined and plaintiff will be, through such action on the part of the defendants, deprived of its property without compensation and without due process of law and wholly in violation of the grant as hereinabove set forth and described between the state of Ohio and Peter Minor, his heirs and assigns, and the lease between said The Defiance Gas & Electric Company and this plaintiff, and all this in contravention of and contrary to Section 10 of Article I of the Constitution of the United States as impairing the obligations of said contracts, and in contravention of and contrary to Section 1, of Article XIV of the Amendments to the Constitution of the United States as depriving this plaintiff of its property without due process of law and as denying it the equal protection of the laws, and contrary to and in contravention of Section 19 of Article I of the Constitution of Ohio.

Wherefore, this plaintiff prays that the defendants and all of their officers, agents, appointees and employees, may be temporarily restrained from obstructing the Miami & Erie Canal southwesterly, or elsewhere, from the plaintiff's mill by draining the water therefrom, filling up said canal or building bulkheads or embankments therein, and from in any wise preventing the flow of water in said canal and from diverting the water from said canal or causing same to be obstructed in or diverted from said canal at any point so as to prevent said water flowing to and through plaintiff's said mill, and plaintiff prays that the defendants and all of their officers, agents, appointees and employees, [fols. 16 & 17] may be temporarily restrained from doing, performing, or causing anything to be done that will prevent the flow of water in said Miami & Erie Canal to and through plaintiff's mill; that said temporary restraining order may remain in force until the hearing and determination of plaintiff's application, herein made, for an interlocutory injunction enjoining them as herein prayed; and plaintiff hereby applies and prays for an interlocutory injunction against each of said defendants, enjoining them respectively to the same extent and in the same manner as hereinabove prayed for as to said temporary restraining order;

and plaintiff prays that upon final hearing said injunction may be made perpetual and that said Senate Bill No. 48 be held to be in conflict with the Constitution of the United States and the Constitution of the State of Ohio and void; and it prays for all proper and equitable relief.

(Signed) U. G. Denman, Karl E. Burr, T. W. Christian, Solicitors for Plaintiff.

Duly sworn to by Frank Heising. Jurat omitted in printing.

[fol. 18] IN UNITED STATES DISTRICT COURT

[Title omitted]

No. 572

ANSWER OF GEORGE F. SCHLESINGER, INDIVIDUALLY AND AS DIRECTOR OF THE DEPARTMENT OF HIGHWAYS OF THE STATE OF OHIO, AND RICHARD T. WISDA, INDIVIDUALLY AND AS SUPERINTENDENT AND DIRECTOR OF THE DEPARTMENT OF PUBLIC WORKS OF THE STATE OF OHIO—Filed Nov. 23, 1928

Now come the defendants George F. Schlesinger, individually and as Director of the Department of Highways of the State of Ohio, and Richard T. Wisda, individually and as Superintendent and Director of the Department of Public Works of the State of Ohio, and for answer to the bill of complaint of the plaintiff represent as follows:

1. These answering defendants admit the corporate capacity, the location of the principal office and place of business, the residence and the purpose of incorporation of the plaintiff; the occupancy of the milling property located immediately above Guard Lock, being Lock No. 9, on the Miami & Erie Canal, by the plaintiff; the official capacity, jurisdiction and powers of the defendant George F. Schlesinger; the official capacity, jurisdiction and powers of the defendant Richard T. Wisda; the official capacities of the defendants Roy E. Davis, Ralph E. Farnsworth and George R. Hoffman; the citizenship and residence of George F. Schlesinger, Richard T. Wisda, Roy E. Davis, Ralph E. Farnsworth and George R. Hoffman, all as alleged in sub-

division numbered 1 of the bill of complaint of the plaintiff herein.

[fol. 19] These answering defendants deny the existence and validity of the alleged lease expiring December 19th, A. D. 2004 or of any other alleged lease whatsoever, under and by virtue of which the plaintiff claims to hold and to use the milling property set forth in subdivision 1, of said bill of complaint.

2. These answering defendants admit that the matter in controversy in this suit, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars and arises under the Constitution of the United States of America.

3. These answering defendants admit that on November 24, 1827, Peter Minor acquired title to and became the owner of the tract of land described in subdivision numbered 3 of the bill of complaint of the plaintiff herein.

4. These answering defendants admit that beginning with the year 1825, the State of Ohio provided for the construction of and thereafter constructed what is known as the Miami and Erie Canal, at the times and places set out in subdivision numbered 4 of the bill of complaint of the plaintiff herein.

5. These answering defendants admit the name and designation, the completion and operation and the nature of the use of said canal; the leasing or sale of water for hydraulic purposes and the nature of the leases or sale contracts therefor, all as set out in subdivision numbered 5 of the bill of complaint of the plaintiff herein. These answering defendants also admit that there has been no commercial navigation on that part of said canal between the village of Grand Rapids and the city of Toledo, Ohio, for about thirty years last past.

6. These answering defendants admit the construction by Peter Minor of a dam across said Maumee River, the purpose of the erection thereof; the construction by said Minor of a mill-race and saw mill and the nature of the operation thereof; and the use by said Minor of said dam and mill-race, all as set out in subdivision 6 of the bill of complaint of the plaintiff herein.

7. These answering defendants admit that subsequent to the construction by said Peter Minor of his said dam, [fol. 20] mill-race and mill, the State of Ohio, in the year 1837, began and completed the construction of the Wabash and Erie Canal in the manner and at the places set out in subdivision numbered 7 of the bill of complaint of the plaintiff herein. These answering defendants further admit that the State of Ohio used said Minor's mill-race and tore down and destroyed his said saw mill, as set out in subdivision numbered 7 of the bill of complaint of the plaintiff herein.

These answering defendants further admit that the State of Ohio constructed a dam across said Maumee River and so constructed said dam in said canal that said Minor's water power, provided and used by him on his said land, was entirely destroyed, and this without first compensating him in any way for his loss and damage suffered thereby and without compensating him in any way for the loss of his lands occupied by said canal, all as set out in subdivision numbered 7 of the bill of complaint of the plaintiff herein.

These answering defendants further admit that said dam so constructed by the State of Ohio has been reconstructed by said State of Ohio and is known as the Grand Rapids Ohio State Dam; that it is built of concrete; that said dam extends across said Maumee River; that said canal connects with said river and extends therefrom northeasterly to the city of Toledo, all as set out in subdivision numbered 7 of the bill of complaint of the plaintiff herein.

These answering defendants further admit that said state dam was constructed by the State of Ohio at a cost of at least $250,000, and that above it is stored a pool of water extending up said river for about eighteen miles, all as set out in subdivision numbered 7 of the bill of complaint of the plaintiff herein.

These answering defendants further admit that Guard Lock, or Lock No. 9, was constructed by the State of Ohio as a part of said Wabash and Erie Canal prior to 1842 and that the same was built of stone, as set out in subdivision numbered 7 of the bill of complaint of the plaintiff herein.

These answering defendants deny that said Grand Rapids Ohio State Dam is indestructible by use or wear, and that [fol. 21] said Guard Lock or Lock No. 9, except as to its

gates regulating the in-flow and out-flow of water, is indestructible by use or wear.

These answering defendants further deny that it would not be practicable or of any benefit to the State of Ohio, or the public, to devote the land occupied by said canal to any other use than as said canal from the point where it connects with the Maumee River to a point northeasterly from said Guard Lock, a distance of about six hundred feet.

8. These answering defendants admit that to adjust in part the damage to which said Peter Minor was entitled for the destruction of his saw mill and other property and to compensate said Peter Minor for his land occupied by the State of Ohio in the construction of said canal, guard lock and dam, said Peter Minor and the State of Ohio entered into an agreement on September 1, 1842, containing the provisions, conditions, stipulations and limitations set out in subdivision numbered 8 of the bill of complaint of the plaintiff herein.

9. These answering defendants admit the making of an award of $2,500.00 by the State of Ohio to said Peter Minor; the failure of the State of Ohio to deliver to said Peter Minor from said canal on the north side thereof sufficient water to run six pairs of four and one-half feet millstones; the delivery by the State of Ohio of enough water only to run one and one-half pairs of such millstones; the making of a claim by said Minor against the State of Ohio for further adjustments under his said agreement of September 1, 1842; the adoption of a resolution by the General Assembly on February 10, 1846; the examination of the claim of said Minor by the Board of Public Works; the finding and order of said Board of Public Works; the agreement of said Minor to execute a conveyance to the State of Ohio in fee simple of a piece of land not exceeding one acre situated on the north side of said canal, all as set out in subdivision numbered 9 of the bill of complaint of the plaintiff herein.

These answering defendants further admit the making and entry of said finding and order by the Board of Public [fol. 22] Works, the filing by said Minor with said board of a written and duly executed final release of his claims against the State of Ohio; the acceptance of said release

by the State of Ohio and the payment to said Minor of an additional sum of Twenty-eight Hundred Dollars, all as set out in subdivision numbered 9 of the bill of complaint of the plaintiff herein.

These answering defendants further admit that said water power was used by said Minor from his said mill-race and it still is used by his successors in interest, on the south side of said canal at a head and fall of from ten to twelve feet.

These answering defendants admit that through said agreement and grant of September 1, 1842, the State of Ohio granted to said Minor, his heirs and assigns forever, the right to take from said canal for hydraulic purposes an amount of water equal to or greater than the amount which he had been using for such purposes at the same location through his said mill-race. These answering defendants further admit that said agreement of September 1, 1842, contained the provision that said Minor, his heirs and assigns, should forever be entitled to draw said water from said canal at said location as a part of the compensation to be made to him by said State of Ohio for the occupation of his lands and his water power theretofore enjoyed by him.

These answering defendants deny that through said agreement and grant of September 1, 1842, said Minor reserved to himself any rights or property whatever. These defendants deny that said agreement of September 1, 1842, was made for the purpose of restoring to said Minor, his heirs and assigns forever, his rights unimpaired as a riparian owner in the use of said water and water power for hydraulic purposes. These answering defendants deny that said water power developed and still develops a water power of about 225 horsepower and is of a value in excess of Seventy-five Thousand Dollars.

10. These answering defendants admit that one Serrick became the owner of said water power and erected thereon a flour mill to be operated by means of said water power; the ownership and operation of said mill with the knowledge and consent of the State of Ohio; the ownership of The Defiance Gas and Electric Company of said flour mills [fol. 23] and the lands whereon said mills stand and in connection therewith, together with the rights and privi-

leges provided for in said agreement and grant of September 1, 1842, to said Peter Minor.

These answering defendants deny that the said The Defiance Gas and Electric Company are the owners of any rights or privileges which could be conveyed by lease or otherwise and further deny the existence or validity of any alleged lease or agreement between the plaintiff herein and the said The Defiance Gas and Electric Company for a period of years ending December 19th, A. D. 2004, together with right to take from said canal sufficient water to be used through said mill on the south side of said canal immediately above said Guard Lock No. 9 to turn one turbine wheel not exceeding four feet in diameter and not exceeding two feet high and not exceeding ten hours per day during the aforesaid time set forth or until December 19, 2004, and of said mill and all the equipment thereof and the lands on which it stands.

These answering defendants deny that the alleged lease of plaintiff herein set forth in the foregoing is of any value. Defendants admit that there is no other source of water supply available to plaintiff for the operation of said mill.

11. These answering defendants admit that on the 11th day of May, 1927, the General Assembly of the State of Ohio passed an act, being Senate Bill No. 48, over the Governor's veto, providing for the abandonment of a portion of the Miami and Erie Canal for both canal and hydraulic purposes, as stated in subdivision 11 of the bill of complaint of the plaintiff herein, and that said act applied to the portion of said canal and contained the provisions described and set out in subdivision 11 of the bill of complaint of the plaintiff herein.

These answering defendants admit that said act took effect August 10, 1927.

These answering defendants admit that they will, unless restrained therefrom by this court, drain the water from the portion of the canal so abandoned and will prevent the [fol. 24] water from the Maumee River from flowing into and through the portion of said canal so abandoned without compensating or paying plaintiff in any wise for the same, without making any provision in any wise for the continuance of the flow of said water or any part thereof to the

plaintiff's said mill, all as set out in subdivision numbered 11 of the bill of complaint of the plaintiff herein.

12. These answering defendants deny that if they shall be allowed to take the action hereinabove described, such action will be in violation of the grant from the State of Ohio to said Peter Minor and the lease between said The Defiance Gas and Electric Company and the plaintiff herein, or in contravention of and contrary to section 10 of Article I of the Constitution of the United States, or in contravention of and contrary to section 1 of Article XIV of the Amendments to the Constitution of the United States, or contrary to and in contravention of section 19 of Article I of the Constitution of Ohio.

Wherefore, defendants pray that plaintiff's alleged cause of action herein may be dismissed and that they may be permitted to go hence without day and recover their costs herein expended.

Edward C. Turner, Attorney General of Ohio; Albert M. Calland, Special Counsel; Joseph A. Godown, Special Counsel, Solicitors for Defendants George F. Schlesinger, individually and as Director of the Department of Highways of the State of Ohio, and Richard T. Wisda, Individually and as Superintendent and Director of the Department of Public Works of the State of Ohio.

Duly sworn to by Richard T. Wisda. Jurat omitted in printing.

[fol. 25] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF ROY E. DAVIS, RALPH E. FARNSWORTH AND GEORGE R. HOFFMAN, INDIVIDUALLY AND AS COUNTY COMMISSIONERS OF LUCAS COUNTY, OHIO—Filed Nov. 23, 1928

Now come the defendants, Roy E. Davis, Ralph E. Farnsworth and George R. Hoffman, individually and as County Commissioners of Lucas County, Ohio, and for answer to the bill of complaint of the plaintiff represent as follows:

1. These answering defendants admit the corporate capacity, the location of the principal office and place of business, the residence and the purpose of incorporation of the plaintiff; the occupancy of the milling property located immediately above Guard Lock, being Lock No. 9, on the Miami & Erie Canal, by the plaintiff; the official capacity, jurisdiction and powers of the defendant George F. Schlesinger; the official capacity, jurisdiction and powers of the defendant Richard D. Wisda; the offical capacities of the defendants Roy E. Davis, Ralph E. Farnsworth and George R. Hoffman; the citizenship and residence of George F. Schlesinger, Richard D. Wisda, Roy E. Davis, Ralph E. Farnsworth and George R. Hoffman; all as alleged in subdivision numbered 1 of the bill of complaint of the plaintiff herein.

These answering defendants deny the existence and validity of the alleged lease expiring December 19th, A. D. 2004 or of any other alleged lease whatsoever, under and by virtue of which the plaintiff claims to hold and to use the milling property set forth in subdivision 1, of said bill of complaint.

[fol. 26] 2. These answering defendants admit that the matter in controversy in this suit, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars and arises under the Constitution of the United States of America.

3. These answering defendants admit that on November 24, 1827, Peter Minor asquired title to and became the owner of the tract of land described in subdivision numbered 3 of the bill of complaint of the plaintiff herein.

4. These answering defendants admit that beginning with the year 1825, the State of Ohio provided for the construction of and thereafter constructed what is known as the Miami and Erie Canal, at the times and places set out in subdivision numbered 4 of the bill of complaint of the plaintiff herein.

5. These answering defendants admit the name and designation, the completion and operation and the nature of the use of said canal; the leasing or sale of water for hydraulic purposes and the nature of the leases or sale

contracts therefor, all as set out in subdivision numbered 5 of the bill of complaint of the plaintiff herein. These answering defendants also admit that there has been no commercial navigation on that part of said canal between the village of Grand Rapids and the City of Toledo, Ohio, for about thirty years last past.

6. These answering defendants admit the construction by Peter Minor of a dam across said Maumee River, the purpose of the erection thereof; the construction by said Minor of a millrace and saw mill and the nature of the operation thereof; and the use by said Minor of said dam and mill-race, all as set out in subdivision 6 of the bill of complaint of the plaintiff herein.

7. These answering defendants admit that subsequent to the construction by said Peter Minor of his said dam, mill-race and mill, the State of Ohio, in the year 1837, began and completed the construction of the Wabash and Erie Canal in the manner and at the places set out in subdivision numbered 7 of the bill of complaint of the plaintiff herein. These answering defendants further admit that the State of Ohio used said Minor's mill-race and fore down and destroyed his said saw mill, as set out in subdivision numbered 7 of the bill of complaint of the plaintiff herein.

[fol. 27] These answering defendants further admit that the State of Ohio constructed a dam across said Maumee River and so constructed said dam in said canal that said Minor's water power, provided and used by him on his said land, was entirely destroyed, and this without first compensating him in any way for his loss and damage suffered thereby and without compensating him in any way for the loss of his lands occupied by said canal, all as set out in subdivision numbered 7 of the bill of complaint of the plaintiff herein.

These answering defendants further admit that said dam so constructed by the State of Ohio has been reconstructed by said State of Ohio and is known as the Grand Rapids Ohio State Dam; that it is built of concrete; that said dam extends across said Maumee River; that said canal connects with said river and extends therefrom northeasterly

to the city of Toledo, all as set out in subdivision numbered 7 of the bill of complaint of the plaintiff herein.

These answering defendants further admit that said state dam was constructed by the State of Ohio at a cost of at least $250,000, and that above it is stored a pool of water extending up said river for about eighteen miles, all as set out in subdivision numbered 7 of the bill of complaint of the plaintiff herein.

These answering defendants further admit that Guard Lock, or Lock No. 9, was constructed by the state of Ohio as a part of said Wabash and Erie Canal prior to 1842 and that the same was built of stone, as set out in subdivision numbered 7 of the bill of complaint of the plaintiff herein.

These answering defendants deny that said Grand Rapids, Ohio, State Dam is indestructible by use or wear, and that said Guard Lock or Lock No. 9, except as to its gates regulating the in-flow and out flow of water, is indestructible by use or wear.

[fol. 28] These answering defendants further deny that it would not be practicable or of any benefit to the State of Ohio, or the public, to devote the land occupied by said canal to any other use than as said canal from the point where it connects with the Maumee River to a point northeasterly from said Guard Lock, a distance of about six hundred feet.

8. These answering defendants admit that to adjust in part the damage to which said Peter Minor was entitled for the destruction of his saw mill and other property and to compensate said Peter Minor for his land occupied by the State of Ohio in the construction of said canal, guard lock and dam, said Peter Minor and the State of Ohio entered into an agreement on September 1, 1842, containing the provisions, conditions, stipulations and limitations set out in subdivision numbered 8 of the bill of complaint of the plaintiff herein.

9. These answering defendants admit the making of an award of $2500.00 by the State of Ohio to said Peter Minor; the failure of the State of Ohio to deliver to said Peter Minor from said canal on the north side thereof sufficient water to run six pairs of four and one half feet millstones; the delivery by the State of Ohio of enough water only to

run one and one-half pairs of such millstones; the making of a claim by said Minor against the State of Ohio for further adjustment under his said agreement of September 1, 1842; the adoption of a resolution by the General Assembly on February 10, 1846; the examination of the claim of said Minor by the Board of Public Works; the finding and order of said Board of Public Works; the agreement of said Minor to execute a conveyance to the State of Ohio in fee simple of a piece of land not exceeding one acre situated on the north side of said canal, all as set out in subdivision numbered 9 of the bill of complaint of the plaintiff herein. [fol. 29] These answering defendants further admit the making and entry of said finding and order by the Board of Public Works, the filing by said Minor with said board of a written and duly executed final release of his claims against the State of Ohio; the acceptance of said release by the State of Ohio and the payment to said Minor of an additional sum of Twenty-eight hundred dollars, all as set out in subdivision numbered 9 of the bill of complaint of the plaintiff herein.

These answering defendants further admit that said water power was used by said Minor from his said mill-race and it still is used by his successors in interest, on the south side of said canal at a head and fall of from ten to twelve feet.

These answering defendants admit that through said agreement and grant of September 1, 1842, the State of Ohio granted to said Minor, his heirs and assigns forever, the right to take from said canal for hydraulic purposes an amount of water equal to or greater than the amount which he had been using for such purposes at the same location through his said mill-race. These answering defendants further admit that said agreement of September 1, 1842, contained the provision that said Minor, his heirs and assigns, should forever be entitled to draw water from said canal at said location as a part of the compensation to be made to him by said State of Ohio for the occupation of his lands and his water power theretofore enjoyed by him.

These answering defendants deny that through said agreement and Grant of September 1, 1842, said Minor reserved to himself any rights or property whatever. These defendants deny that said agreement of September 1, 1842,

was made for the purpose of restoring to said Minor, his heirs and assigns forever, his rights unimpaired as a riparian owner in the use of said water and water power for hydraulic purposes. These answering defendants deny that said water power developed and still develops a water [fol. 30] power of about 225 horsepower and is of a value in excess of Seventy-five Thousand Dollars.

10. These answering defendants admit that one Serrick became the owner of said water power and erected thereon a flour mill to be operated by means of said water power; the ownership and operation of said mill with the knowledge and consent of the State of Ohio; the ownership of The Defiance Gas and Electric Company of said flour mills and the lands whereon said mills stand and in connection therewith, together with the rights and privileges provided for in said agreement and grant of September 1, 1842, to said Peter Minor.

These answering defendants deny that the said The Defiance Gas and Electric Company are the owners of any rights or privileges which could be conveyed by lease or otherwise and further deny the existence or validity of any alleged lease or agreement between the plaintiff herein and the said The Defiance Gas and Electric Company for a period of years ending December 19th, A. D. 2004, together with right to take from said Canal sufficient water to be used through said mill on the south side of said Canal immediately above said guard lock Number 9 to turn one turbine wheel not exceeding four feet in diameter and not exceeding two feet high and not exceeding ten hours per day during the aforesaid time set forth or until December 19, 2004, and of said mill and all the equipment thereof and the lands on which it stands.

These answering defendants deny that the alleged lease of plaintiff herein set forth in the foregoing is of any value. Defendants admit that there is no other source of water supply available to plaintiff for the operation of said mill.

11. These answering defendants admit that on the 11th day of May, 1927, the General Assembly of the State of Ohio passed an Act, being Senate Bill No. 48, over the Governor's veto, providing for the abandonment of a portion of the Miami and Erie Canal for both canal and hy-

draulic purposes, as stated in subdivision 11 of the bill of complaint of the plaintiff herein, and that said act applied to the portion of said canal and contained the provisions described and set out in subdivision 11 of the bill of com-
[fol. 31] plaint of the plaintiff herein.

These answering defendants admit that said act took effect August 10, 1927.

These answering defendants admit that they will, unless restrained therefrom by this court, drain the water from the portion of the canal so abandoned and will prevent the water from the Maumee River from flowing into and through the portion of said canal so abandoned without compensating or paying plaintiff in any wise for the same, without making any provision in any wise for the continuance of the flow of said water or any part thereof to the plaintiff's said mill, all as set out in subdivision numbered 11 of the bill of complaint of the plaintiff herein.

12. These answering defendants deny that if they shall be allowed to take the action hereinabove described, such action will be in violation of the grant from the State of Ohio to said Peter Minor and the lease between said The Defiance Gas and Electric Company and the plaintiff herein, or in contravention of and contrary to section 10 of Article I of the Constitution of the United States, or in contravention of and contrary to section 1 of Article XIV of the Amendments to the Constitution of the United States, or contrary to and in contravention of section 19 of Article I of the Constitution of Ohio.

Wherefore, defendants pray that plaintiff's alleged cause of action herein may be dismissed and that they may be permitted to go hence without day and recover their costs herein expended.

(Signed) Leroy W. Hunt, Prosecuting Attorney of Lucas County, Ohio; Herman C. Kruger, Assistant Prosecuting Attorney of Lucas County, Ohio, Solicitors for Defendants Roy E. Davis, Ralph E. Farnsworth, and George R. Hoffman, Individually and as County Commissioners of Lucas County, Ohio.

[fol. 32] *Duly sworn to by Ralph E. Farnsworth. Jurat omitted in printing.*

[fol. 33] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE EVIDENCE, ETC.

In addition to the allegations and admissions made and contained in the pleadings it is hereby stipulated and agreed by and between the parties, plaintiff and defendants, and by and between their respective counsel in this suit, as follows:

1. That, so far as they are material to the issues involved in this case, the originals of the leases, agreements, grants, deeds, records of administrative boards, legislative or other resolutions, maps and diagrams, and special and general laws of the States of Ohio and Indiana and of Congress of the United States, all as listed or referred to below in this stipulation, may be considered as offered and received in evidence without formal proof and that copies of the same respectively, except said constitutional sections and said resolutions and laws, are attached hereto and may be used in evidence in lieu of the originals and be designated as "Stipulation Exhibits", numbered consecutively from 1 upward.

Stipulation Exhibit No. 1. Agreement between the State of Ohio and Peter Minor, dated September 1, 1842.

Stipulation Exhibit No. 2. Proceedings of Messrs. Follett Blickenderfer and Forrer, Members of the Board of Public Works of the State of Ohio, dated February 23, 1846, on the claim of Peter Minor under joint resolution of the General Assembly of Ohio passed February 10, 1846.

[fol. 34] Stipulation Exhibit No. 3. Lease from The Defiance Gas & Electric Company, being the Company of that name mentioned in both paragraphs 1 and 10 of the Bill of Complaint, to the plaintiff in this case, which lease was entered into in the year 1922 and expires by its terms on December 19, A. D. 2004.

Stipulation Exhibit No. 4. List of, (a), certain sections of the Constitution of Ohio, and, (b), certain legislative acts and resolutions of the General Assemblies of the States of Ohio and Indiana and of Congress of the United States.

Stipulation Exhibit No. 5. Blue print map of the Miami & Erie Canal from the Maumee River above the Grand Rapids State Dam to Toledo, Ohio.

2. That lock No. 44 on the Miami & Erie Canal mentioned in said lease from The Defiance Gas & Electric Company to the plaintiff, The Providence Mill Company, copy of which lease is Stipulation Exhibit No. 3, is the same lock referred to in the Bill of Complaint and in Stipulation Exhibit No. 5 as lock No. 9, or guard lock.

3. That said Stipulation Exhibit No. 1 is a true copy of the agreement duly executed, delivered and entered into by and between the State of Ohio and Peter Minor on the first day of September, 1842 as alleged in the Bill of Complaint.

4. That Stipulation Exhibit No. 2 is a true copy of the correctly recorded official proceedings of Messrs. Follett, Blickenderfer and Forrer, as members of the Board of Public Works of the State of Ohio, which proceedings were taken and recorded in the office of said Board of Public Works on February 23, 1846, and that said proceedings are truly made with respect to all things which said record purports to show relative to the claims of Peter Minor for readjustment of his rights with the State of Ohio under said agreement of September 1, 1842, a copy of which agreement is said Stipulation Exhibit No. 1, said proceedings of said Board of Public Works being the proceedings mentioned and referred to in the Bill of Complaint.

5. That Stipulation Exhibit No. 3 is a true copy of the [fol. 35] lease and agreement entered into, executed and delivered between The Defiance Gas & Electric Company and the plaintiff in the year 1922, being the lease mentioned and referred to in paragraphs 1 and 10 of the Bill of Complaint, said lease by its terms expiring on December 19, A. D. 2004.

6. That Stipulation Exhibit No. 5 is a map of the Miami & Erie Canal from its northeasterly end where it empties into Swan Creek in the City of Toledo, Ohio southwesterly up the Maumee River to where said canal connects with said Maumee River southwesterly from the Grand Rapids, Ohio State Dam, and that said map is a true representation thereof and of its terminals, location with respect to the

Maumee River, Broadway Street, in Toledo, Ohio, the River Road or Toledo-Napoleon Road, so-called, the location of Swan Creek into which said canal empties at its present northerly end, guard lock or lock No. 9, also known as lock No. 44, the town of Providence, unincorporated, in Lucas County, Ohio, the village of Grand Rapids, formerly Gilead, in Wood County, Ohio, the flour mill just above said guard lock and designated "Pilliod's Mill", the Grand Rapids, Ohio State Dam, the connection of said Miami & Erie Canal with the Maumee River, all as mentioned and referred to in the Bill of Complaint; and said map is a true representation of all the other matters, places and things and their respective locations which said map purports upon its face to show, including a State Highway leading southerly from said Toledo-Napoleon road across said Miami & Erie Canal about six hundred (600) feet east of said lock No. 9 and across said Maumee River into said village of Grand Rapids, Ohio.

It is further agreed that on the northerly side of said Miami & Erie Canal, beginning with said lock No. 9 and extending westerly up said river the northerly bank of said canal descends into a deep ravine to a depth of about twenty (20) feet and then and at the northerly bank of said ravine there is a steep ascent of about fifty (50) feet up to the top of the hill, on which lies said Toledo and Napoleon [fol. 36] road extending on up said Maumee River westerly from said road that leads southerly across said canal, just easterly of said lock No. 9.

7. That the sections of the Constitution of the State of Ohio, the legislative acts and resolutions of the General Assembly of the State of Ohio and of the State of Indiana and the Congress of the United States, all as listed in Stipulation Exhibit No. 4 filed hereunder in this case, and any other special or general act or resolution of said General Assembly of Ohio relating to the Miami & Erie Canal, including said resolution of the General Assembly of Ohio passed February 10, 1846 authorizing the Board of Public Works of the State of Ohio to examine and readjust the claim of said Peter Minor, shall be considered as in evidence before this court and any reviewing court so far as

relevant and material to the controversy in this suit without incorporating the same as a part of the record in this cause; and that counsel for either plaintiff or defendants may refer to or quote any provision or provisions, part or parts thereof, in argument or brief as if matters of judicial notice, subject to correction by opposing counsel through reference to and quotation from authentic publications without encumbering the record in this cause by formally incorporating the same in full as a part of the record.

8. That the ownership by said The Defiance Gas & Electric Company of water power in question in this case extends to and it is the owner of whatever water power and other rights were given to or recognized to be in Peter Minor, his heirs, successors and assigns, through said agreement of the first day of September, 1842, copy of which is said Stipulation Exhibit No. 1, and as said rights were readjusted and determined under said proceedings taken and completed between the State of Ohio, through its Board of Public Works, and said Peter Minor on February 23, 1846, a true copy of the record of which proceedings is said Stipulation Exhibit No. 2.

Said ownership by said The Defiance Gas & Electric Company is subject to the rights of the plaintiff under said [fol. 37] lease between that company and the plaintiff, a true copy of which is said Stipulation Exhibit No. 3.

9. (a) That said Grand Rapids, Ohio State Dam is constructed of the highest grade re-enforced concrete in all its parts in accordance and in compliance with the highest standard of engineering requirements for such work and construction for such purposes as said dam is required to effect as shown by the Bill of Complaint.

(b) That said guard lock, or lock No. 9 or No. 44, so-called, in all of its walls and parts except its inlet and outlet gates, is constructed of cut stone, the blocks of said stone being two (2) feet thick, three (3) feet wide and in varying lengths from two (2) feet upward, said walls being three (3) feet thick, laid in first quality cement and in compliance with the highest standard of engineering requirements for such work and construction for such purposes as said lock was required to effect as shown by the Bill of Complaint; that the frames of said inlet and outlet

gates of said lock are constructed of heavy oak timbers and the panels thereof are constructed within said frames of heavy oak planks three (3) inches in thickness, braced and held in place in compliance with the highest standard of engineering requirements for such work and construction; that the upper or inlet gate of said lock has been closed since navigation ceased on said canal as alleged in the Bill of Complaint and the water of said canal, except such thereof as is used in the operation of plaintiff's mill, passes around said lock through other gates known as waste way or regulating gates constructed by said The Defiance Gas & Electric Company, at its own cost and expense, of heavy cast-iron plates, movable for opening and closing and regulation by proper machinery, all of which regulating gates and all parts of their regulating equipment and all parts of said inlet and outlet gates of said lock are kept in repair at the cost and expense of the plaintiff.

10. That the mill occupied and operated by plaintiff as alleged in the Bill of Complaint is a flour and stock and [fol. 38] poultry feed mill, known and on Stipulation Exhibit No. 5 it is designated as "Pilliod Mill;" that it is so operated by plaintiff as alleged in the Bill of Complaint through and by the water power in question in this case under said agreement of September 1, 1842, as readjusted on the claim of Peter Minor through proceedings of the Board of Public Works and said Minor taken on February 23, 1846, a true copy of which agreement is Stipulation Exhibit No. 1 and a true copy of the record of said proceedings for readjustment being Stipulation Exhibit No. 2; and that the water used as aforesaid in the operation of said mill constitutes a water power of at least two hundred twenty-five horse-power and is of a value in excess of Seventy-five Thousand Dollars ($75,000).

11. That all the waters in said canal run northeasterly out of and from the pool of the Maumee River above the Grand Rapids, Ohio State Dam, including the water used by plaintiff in said water power as aforesaid; that said agreement of September 1, 1842 between the State of Ohio and Peter Minor, readjusted as aforesaid, is the only agreement permitting the taking of water from said Miami & Erie Canal between the point where said canal connects with the

Maumee River above and southwesterly from said Grand Rapids, Ohio State Dam and said guard lock or lock No. 9; and that said waters used by plaintiff as aforesaid pass through said mill operating the same and out into the Maumee River.

12. That the Defiance Gas & Electric Company as owner of all the rights under said agreement of September 1, 1842, readjusted as aforesaid, and the plaintiff herein as lessee of said Company have throughout the time of such ownership and leasing performed all the obligations stipulated in said agreement and readjustment as aforesaid for them, or either of them, to perform; and that plaintiff has been and still is operating its said mill under said leasing agreement with said The Defiance Gas & Electric Company since the execution and delivery thereof in 1922, and therein plaintiff has been and still is using the amount of water stipulated in said lease for it to use in such operation and therein operating said mill in the manufacture of its products herein-[fol. 39] above mentioned in this Stipulation and Agreement to the capacity thereof.

13. The Bill of Complaint in this cause may be considerad as amended by striking out the word "northwesterly" in the third line from the top of page 2 thereof and inserting in lieu thereof the word "southwesterly."

14. It is hereby agreed that this Stipulation and Agreement between the parties, plaintiff and defendants, on the evidence is only for the purposes of this case in this court and on any review thereof in any reviewing court.

The Providence Mill Company, by U. E. Denman, and Karl E. Burr, Solicitors for Plaintiff. Harry J. Kirk, Director of Highways of Ohio; Richard D. Wisda, Superintendent and Director of Public Works of Ohio, by Edward C. Turner, as Attorney General of Ohio; Albert M. Calland, and Joseph A. Godown, Solicitors for Defendants Kirk and Wisda. Roy E. Davis, Ralph E. Farnsworth, George R. Hoffman, Commissioners of Lucas County, Ohio, by Leroy W. Hunt, Prosecuting Attorney of Lucas County, and Herman C. Krueger, Assistant Prosecuting Attorney of Lucas County.

[fol. 40] STIPULATION EXHIBIT No. 1

Lease

State of Ohio

to

Peter Minor

Recorded in Record of Deeds and Leases M. & E. Canal, Office Ohio State B. P. W.

This agreement made this first day of September, A. D. 1842, between the State of Ohio, party of the first part, by R. Dickinson, Acting Commissioner and member of the Board of Public Works, thereto duly authorized by law, and by the order of the said Board made in pursuance thereof, and Peter Minor of the County of Lucas, and State aforesaid, party of the second part, Witnesseth: That said party of the first part, for and in consideration of the releases, quit claims, and covenants of the party of the second part, hereinafter contained and upon the express condition that the party of the second part shall continue, at all times, and forever, hereafter to comply with all and singular, the limitations, conditions and covenants hereinafter contained, and shall in every respect perform all the stipulations of this agreement by said party to be performed: Agrees to sell and convey and does by these presents sell and convey to the said party of the second part, his heirs and assigns forever; subject to the limitations and conditions herein contained, a sufficient quantity of water properly applied, to propel eight pairs of four and a half feet mill stones, with all the labor saving machinery necessary for the manufacture of superfine flour, to be applied at all seasons of the year; except when otherwise necessary for the navigation of the canal, or when breaches occur, repairs become necessary and other unavoidable causes prevent; provided that nothing herein contained shall hold the State of Ohio responsible to furnish the above amount of water or any part thereof to the said party of the second part, to the damage and injury of mill owners and proprietors of water power on the Maumee River at, opposite and below the towns of Providence and Gilead.

The water hereby leased for six of the said pairs of mill stones and their appertaining machinery, is to be taken from the Wabash and Erie Canal at and immediately above the Guard Lock, being Lock No. Nine, on said Canal and near the town of Providence on the North side of said Canal, by means of suitable regulating Gates, and to be discharged into the Canal below said Guard Lock, by means [fol. 41] of a suitable regulating weir, to be constructed in a safe, substantial and workmanlike manner, by and at the expense of the party of the first part, as hereinafter specified.

The water for the remaining two pairs of mill stones, and their appertaining machinery, is to be taken from the said Canal on its South side; and from the level immediately above said Guard Lock by means of a regulating weir, to be constructed by and at the expense of the party of the second part, as hereinafter specified.

And the said party of the second part, for and in consideration of the right to the use and occupation of said water, leased and conveyed as aforesaid, hereby releases, conveys and forever quit claims to the State of Ohio, and to her assigns forever, all right, title and interest, claim and demand of every kind whatever, against said State of Ohio, for the use and occupation of the water from the Maumee River for the occupation of all lands used and appropriated in the construction of the Wabash and Erie Canal and its appurtenances, for the occupation of all mill sites of the party of the second part, and for the destruction or injury of and to all mills, dams and mill-races, and all other property either personal or real, which has been damaged, injured or destroyed in consequence of the construction of the said Wabash and Erie Canal; excepting only the right to claim and receive an assessment of damages for the destruction of a saw mill, the property of the party of the second part, which stood on ground now occupied by said Canal.

And the said party of the first part hereby agrees, that the said State of Ohio shall erect and complete within eighteen months from the date hereof at the expense of the said State, in a secure, substantial and workmanlike manner, and keep in good repair, the regulating Gate, and weir above mentioned, to be constructed by the State, and to con-

struct the same of stone walls of solid masonry and suitable timber and iron with the necessary embankments, agreeably to a place to be furnished by the Acting Commissioner or Engineer employed on said Canal or any adjoining portion thereof; and under the direction and subject to the inspection of such Acting Commissioner or Engineer; [fol. 42] the gates through which the water is to be drawn from the Canal to be so placed and formed that, together with the weir below, they may at all times be readily made to secure a uniform and regular flow of water from the upper to the lower levels of the Canal according to the pleasure and discretion of the Acting Commissioner or Engineer, whether the hydraulic works are in operation or not.

And the said party of the second part further agrees to erect, complete and keep in good repair the regulating weir on the South side of the Canal, to be constructed of stone walls and plates of wood, with a substantial iron bar securely bolted on the top thereof, agreeably to a place to be furnished by the Acting Commissioner or Engineer employed on said Canal, or on any adjoining part thereof, and under the direction and subject to the inspection of such Acting Commissioner or Engineer; or to erect instead of the said weir, such feeder gate or gates, according to a plan to be furnished, as above, the work and material of which are to be approved of as above; and said gates when so constructed shall be under the control and management of such Acting Commissioner or Engineer. The weir or lower sill of the feeder gates over which the water is to pass from the Canal is to be so placed and formed that the top of the weir or lower sill of the feeder gates shall not be more than six inches below the level at which it shall be designed to sustain the surface of the water in that part of the canal from whence the water is to be drawn. The said feeder gate or gates are to be so situate so constructed that any duly authorized Agent of the State of Ohio may conveniently stop all the water from flowing through them, and that the quantity of water at any time to flow through them may conveniently be regulated in accordance with the intention of the parties to these presents and the description and direction of the Acting Commissioner or Engineer; the full right to direct, manage and control which, is hereby expressly reserved to the State of Ohio.

And it is further expressly agreed that the party of the second part shall not, for any purpose, or in any manner whatever, obstruct the equal and regular flow of water [fol. 43] from one line of the Canal to another, nor increase the flow, nor cause the water or any part thereof, to flow out of the Canal, except as hereinbefore provided; nor shall the party of the second part permit any of said acts or things to be done by any person or persons employed in or about the mill or hydraulic works propelled by water hereby leased; and the said party of the second part shall be considered and held responsible for keeping the head races and regulating gates and weirs to be by him erected as above described, constantly in good repair and free from all obstructions; and a failure to do so or any interference with the flow of the water on their part, or on the part of any other person employed in or about said mills or hydraulic works aforesaid, shall be adjudged, and is hereby agreed to be determined a suspension of this lease, and of the rights and privileges of said party of the second part, growing out of this agreement, until the said party of the second part shall have paid to the proper Agent of the State of Ohio, all and singular the damages and costs of repairs which may have resulted from such failure or interference and furthermore have fully complied with these covenants.

And when at any time by the carelessness, neglect, or interference with the flow of water by the party of the second part or others in his employ, there shall occur any breach in the bank, the formation of a bar or other injury to the Canal, and also in case of the occurrence of any such injury or injuries in consequence of an unfaithful or unsubstantial construction of any of the weirs, gates, embankments or other works to be constructed by the party of the second part, or in consequence of such said works being out of repair, then said party of the second part shall, on being notified thereof by said Acting Commissioner, Engineer or other proper Agent of the State, immediately repair said breach or other injury, or if such Agent of the State shall cause the same to be done (which he is hereby authorized at his option to do) then, said party of the second part shall pay to the said agent, all the necessary expenses incurred in repairing such breach or other injury on demand.

[fol. 44] And it is further understood and agreed that the water power hereby leased, or conveyed shall not be used to drive or propel any mill or other machinery of works, from which saw dust chips or other rubbish will be likely to be carried, thrown or floated into the Canal, so as to form obstructions to the navigation thereof, or to clog the gates, waste or regulating weirs, or otherwise injure or obstruct the same. And the said party of the second part shall at all times be bound to keep the Canal clear of all rubbish, or other obstructions consequent in any manner, on the use of the water hereby leased, and of the works and machinery erected therefor.

And if the party of the second part shall in any respect fail to fulfill and perform all the engagements of the said party hereinbefore expressed, or shall do, or permit to be done any act or thing hereby prohibited, or shall in any respect violate this agreement, then and in either case, all the rights and privileges derivable to said party of the second part from this agreement, shall from time of such violation, cease and determine until by some competent judicial judgment or decree such rights and privileges shall be duly restored; and any authorized Agent of the State shall have full power to enter upon and take possession of the premises and resume all the rights and privileges hereby granted to the party of the second part and hold the same until otherwise determined by a court of competent jurisdiction; and the said party of the second part shall moreover be liable for all damages consequent upon such violation of this agreement.

And it is further understood and agreed by the parties to this agreement that the head of water to be used by the party of the second part as aforesaid to propel the six pairs of mill stones on the North side of said Canal is not to be less than four and a half feet, measuring from the surface of water above said Lock to the surface of water in Canal below the lock. And that the power for said two pairs of mill stones to be used on the South side of said Canal is to be so used to propel saw mills and is only to be used when there is a surplus of water in the Maumee River after supplying the Canal with water sufficient for the purposes of navigation and for all mills and other [fol. 45] hydraulic works that have been or may be here-

after leased from said State of Ohio. And it is further agreed, that the regulating weir to regulate the flow of water from the canal to the saw mill, on the South side of the canal as aforesaid, shall be constructed at the expense of the party of the first part, instead of the party of the second part as aforesaid, but ever thereafter to be kept in good repair by and at the expense of the party of the second part.

In testimony whereof, the parties executed this agreement the day and year first above written.

"R. Dickinson," Acting Commissioner for the Board of Public Works. "Peter (his x mark) Minor." (Seal.)

Signed, sealed, and delivered in presence of Pliny Hoagland, Andrew Young.

Sept. 13, 1842—Acknowledged by Peter Minor, before R. Corocrett, Justice of the Peace, Lucas County, Ohio.

[fol. 46] Bond

Peter Minor
to
The State of Ohio.

Recorded in Record of Deeds and Leases
M. & E. Canal, Office Ohio State
Board of P. W.

Know all men by these presents, that I, Peter Minor of Lucas County, Ohio, am hereby held and firmly bound to the State of Ohio in the penal sum of Five Hundred Dollars, to which payment I bind myself, my heirs and assigns forever. Signed with my hand, and sealed with my seal this 15th day of July, 1846.

The conditions of the above obligation are that I hereby agree to convey to the State of Ohio within two months from this date a certain lot of ground, not exceeding one half acre agreeably to the terms of an agreement entered into between me and the State of Ohio, by the Board of Public Works, the payment of which I hereby acknowledge to have received in full. Said lot of ground to be laid off on the North side of the Wabash and Erie Canal near the head of the Maumee Rapids in Lucas County aforesaid, and

to be bounded as follows: Beginning at a point in the North line of the towing path, one chain and sixty-nine links above the head of the guard lock and running thence at right angles with the Canal north three and ½° east one chain and eighty-nine links; thence up the Canal parallel with the towing path for quantity.

(Signed) Peter (his x mark) Minor. (Seal.)

Two witnesses.

[fol. 47] STIPULATION EXHIBIT No. 2

Monday, February 23, 1846.

Present: Messrs. Follett, Blickenderfer and Forrer.

Claim of Peter Minor

The Board proceeded under the Joint Resolution of the General Assembly, passed February 10, 1846, to examine the claim of Peter Minor, which resolution is in the words following:

"Resolved by the General Assembly of the State of Ohio, that the Board of Public Works are hereby authorized to examine the claim of Peter Minor, for the non-performance of a certain contract entered into by R. Dickinson, Acting Commissioner of the Board of Public Works with the said Minor, on the first day of September, one thousand eight hundred and forty-two, and all other matters in dispute between the State and the said Minor, and that they report to the Commissioners of the Canal Fund any further sum, which they may find due him, provided that the said Minor shall, before the investigation of his claim, execute and deliver to the said Board a full and final release to the State of all further claims of any description, except so much as may be awarded to him by said Board under this resolution.

"Elias F. Drake," Speaker of the House of Representatives. "Seabury Ford," Speaker of the Senate."

February 10, 1846.

In pursance of the requirement of the above Resolution the said Minor, on this day, filed with the Board, a full and final release to the State, duly executed; a copy of which release is here inserted, and is as follows:

"Know all men by these presents, that whereas, Peter Minor, did, on the first day of September, A. D. 1842, enter into an agreement with the State of Ohio, by R. Dickinson, Acting Commissioner, and Member of the Board of Public Works, by which, amongst other things, it was stipulated on the part of the said State of Ohio, that the said Peter [fol. 48] Minor, should relinquish to said State all right to claim damages for lapses consequent upon the construction of the Wabash and Erie Canal through his land and premises in Lucas County in said State, excepting a claim for the loss of a saw mill which occupied the site of the said canal; for which relinquishment, the said state would supply a water power to said Minor, upon his premises, sufficient to propel eight pairs of four feet and a half mill stones; and

Whereas, also, the General Assembly, of the State of Ohio did on the 10th day of February, A. D. 1846, pass a resolution 'authorizing the Board of Public Works to examine the claim of Peter Minor,' a copy of which is hereto attached. (See copy of Resolution above.)

Now therefore, I, the said Peter Minor, in pursuance of said resolution; and in consideration of the sum of one dollar to me in hand paid, the receipt whereof is hereby acknowledged, do hereby release, remise and forever quit claim unto the State of Ohio, all right, title and interest, estate and claim in and to the ground occupied by said canal and its appurtenances, and the easement necessary for the navigation thereof; and to all claims of damages for loss of water, and other losses of every kind, resulting from the construction of said canal and appurtenances, along, through and over the premises and land owned by me, the said Peter Minor, and also on account of the inability of said State to supply the full amount of water power provided for in the contract aforesaid. To have and to hold the aforesaid rights and privileges unto the State of Ohio forever.

I moreover agree to receive as compensation in part for losses resulting from a deficiency in the quantity of water

leased, any and all of the water which may pass around the guard lock from the level of the pool of the dam to the canal below the lock, together with the sawmill power provided for in the contract, and to receive a lease for the same [fol. 49] on the term and conditions provided for in the contract aforesaid.

In testimony whereof, I, the said Peter Minor, have hereto set my hand and seal this 23rd day of February A. D. 1846.

Peter (his mark) Minor. (Seal.)

Signed, sealed, and delivered in presence of A. B. Newburgh, B. B. Brown.

THE STATE OF OHIO,
Franklin County, ss:

Personally came before me, a Justice of the Peace, in and for said County, Peter Minor, grantor and releasor in the foregoing conveyance, and acknowledged the same to be his voluntary act and deed. Witnesseth my hand this 23rd day of Feb. A. D. 1846.

A. Patten, J. P."

Now for the purpose of more fully understanding the claim of said Peter Minor, which rests on the contract or agreement referred to in the resolution above cited, said contract is here inserted in full, and is in the words following, namely:

(Copy of said contract is Stipulation Exhibit No. 1 in this case.)

From the above contract, it will appear that the claim presented for the consideration of the Board, by the said Minor, under the resolution, consist in this: That the agents of the State having failed from want of fall in the canal and other causes to furnish to the said Minor the water necessary to propel the six run of mill stones mentioned in said contract; and from due examination, it appearing that the total of water, which may be furnished to said Minor, "at and immediately above the Guard Lock, being Lock No. 9 on said canal, and near the town of Providence," does not exceed one and a half millstone power.

The Board were constrained by the terms of the Resolution, in examining the claim of said Minor for this water,

to place a cash value on the same, with a view of determining the amount said claim when offset against "other matters in dispute" between the State and said Minor, re- [fol. 50] ferred to in said Resolution.

It will appear on reference to the terms of said contract, or agreement of Sept. 1, that in the releases of said Minor, in consideration of the grants on the part of the State, he expects and reserves "the right to claim and receive an assessment of damages for the destruction of a saw mill." This reservation from the knowledge possessed by the Board, of the ground occupied by the canal and the damage inflicted by its location on the property of said Minor, is understood to apply only to the mill, and not to the dam, or mill-race, or any other property connected with the use of the water at Providence. But by reference to an award on this reserved claim, made by the appraiser of Damages on the Wabash and Erie Canal, it would appear that notwithstanding the full release contained in the contract of September 1st, the appraisers took into consideration the general damage sustained by said Minor by the location of the canal.

This will more fully appear by reference to the "award," a copy of which is here given, and is as follows:

"Peter Minor claims damage for injury done to his property in Providence Township, Lucas County, Ohio. The applicant states in his application that he had erected and constructed at a great expense, a valuable saw-mill, mill dam and mill race, previous to the construction of the Wabash and Erie Canal, and that by the construction and location of said Wabash and Erie Canal, his mill dam, mill and race were all destroyed. Upon the examination of the above described premises, and from facts elicited of the Resident Engineer, we find that the canal is located and constructed directly upon the site that the saw mill of the applicant stood on, and that the mill was torn down and destroyed by order of the Resident Engineer, then in charge of that division of the Wabash and Erie Canal. And the applicant further claims for some 150 saw logs that he had on hand at the time of the destruction of his property, above stated; also for timber used and destroyed; also for stone taken from his premises to build and construct culverts on said Wabash & Erie Canal; also for the mill irons

either lost or become valueless by the destruction of his, the [fol. 51] applicant's, mill; for a bridge built across his mill race, and for the land occupied by said Wabash and Erie Canal.

Upon mature deliberation and considering that the applicant has laid out of the use of his mill since the year 1839, without receiving from the State any compensation whatever, after comparing the damage incurred with the benefits received, we assess the damages that the said Peter Minor has sustained, or may sustain, as aforesaid, at Two Thousand Five Hundred Dollars, as full compensation and payment of all right, interest and claim thereto.

"Joseph McCutcheon, T. J. Price."

$2,500.
February 23rd, 1846.

Peter Minor's Claim

This allowance of $2,500 is erroneously made, as we conceive, through ignorance on the part of the appraisers, of the existence of the full release contained in the contract of September 1st, of all damage beyond the value of his saw-mill, by the said Minor, or from some other cause, not understood. It is clearly a large allowance beyond the value of his mill, which except therefore, we feel warranted in taking into consideration in estimating the damage sustained by the said Minor by the failure of the State to furnish the power for the six mill stones "at and immediately above the Guard Lock near the town of Providence" mentioned in said contract of Sept. 1, 1842.

With the facts in this case fully before them, drawn from the documents and papers here exhibited, the Board adjudge and determine as follows:

First. That the power created by the water discharged around the Guard Lock near the town of Providence, estimated at one and a half mill stone power, be the same more or less, shall be possessed and enjoyed by the said Peter Minor, for his own proper use, and under the limitations and restrictions imposed for the use of the water for the six mill stone power by the contract of the 1st of September, 1842.

[fol. 52] Second. That in addition to the large excess awarded by the appraisers for his saw-mill, the said Minor shall be allowed the further sum of Two Thousand Eight Hundred Dollars, which with the water for the two pairs of mill stones, stipulated to be taken from the south side of the canal in the contract of the 1st of Sept. 1842, (to be taken from the canal under all the limitations and restrictions imposed by said contract) shall be in full liquidation of all claims for damage, of all and every kind, sustained by said Minor in the location and construction of the Wabash and Erie Canal, and its appurtenances, either reserved in said contract of the 1st of Sept. 1842, or growing out of any failure on the part of the State to fulfill the conditions and stipulations in said contract contained, or for the appropriation of the water of the Maumee River, claimed by the said Minor, for canal navigation or hydraulic purposes. And this allowance shall also be taken in satisfaction of a piece of land, not exceeding one acre, situated on the north side of the canal, claimed by the Acting Commissioner as necessary for the erection of a lock house, for which piece of land the said Minor has agreed to execute a conveyance to the State in fee simple.

The following report was made by the Board to the Commissioners of the Canal Fund:

Office of the Board of Public Works, Columbus

Feb. 23, 1846.

To E. N. Sill, Esq., Acting Fund Commissioner:

Sir: In the matter of Peter Minor, referred to the Board of Public Works, under a resolution of the General Assembly of the 10th inst., the Board have this day determined that there is due the said Minor, on an adjustment of his rights under his contract, with the State, the sum of Twenty Eight Hundred Dollars, independent of certain water power to be secured to said Minor.

By order of the Board.

A. B. Newburgh, Sec'y.

[fol. 53] Columbus, Ohio, Aug. 14th, 1912.

I, Chas. W. Diehl, Secretary of the Board of Public Works of the State of Ohio, hereby certify the foregoing

to be a true copy of the Records of said Board as recorded in Vol. 4, A, Pages 73, 74, 78, 79, 80 and 81, so far as the same related to the matter of the grant to Peter Minor on the Wabash & Erie Canal.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said Public Works, the day and date above written.

"Chas. W. Diehl, Sec'y Board of Public Works."

[fol. 54] STIPULATION EXHIBIT No. 3

This indenture, made this — day of ——, 1922, between The Defiance Gas & Electric Company, a corporation organized and existing under the laws of the State of Ohio and having its principal office at Defiance, Ohio, Lessor, party of the first part, and the Providence Mill Company, a corporation organized and existing under the laws of the State of Ohio, having its principal office at Grand Rapids, Ohio, Lessee, party of the second part, witnesseth that

Whereas, the party of the first part has lately acquired certain lands and premises and other property, real and personal, of which the property hereinafter demised and leased forms part, such acquisition having been made in pursuance of the authorization of The Public Utilities Commission of the State of Ohio, in accordance with its Order #2466, dated January 27th, 1922, in and by which it is provided that the consent and approval of the Commission was granted to the acquisition by the party of the first part hereto of all property constituting the public electrical utility known as the Grand Rapids-Weston Light & Power Company, and

Whereas, included in the property so acquired by the Lessor there is a Grist Mill Building with grist mill machinery therein (known as the Pilliod Mill) which properly forms no part of the said electrical utility property, but which is physically practically inseparable from said public utility property formerly known as the Grand Rapids-Weston Light & Power Company aforesaid, and

Whereas, it is no part of the business of the Lessor to operate a grist mill and it is believed to be for the pub-

lic interest of the inhabitants in the Village of Grand Rapids and its neighborhood that a grist mill should be operated as heretofore on the property of which the premises hereby demised are a part, and

Whereas, it is the intent of these presents to provide for the satisfactory operation of the grist mill without interference with the other electrical business of the Lessor rather than for the Lessor to attempt to derive revenue from it,

[fol. 55] Now, therefore, in consideration of the facts above recited and the mutual covenants herein contained these presents witness, that The Defiance Gas & Electric Company, Lessor, as aforesaid, does hereby demise, let and lease (subject to all the covenants and conditions herein contained) to the said Providence Mill Company, its successors and assigns, the property hereinafter described now in use and useful for grist mill purposes, for the term commencing with the date of this Instrument and expiring on the 19th day of December A. D. 2004 (unless sooner terminated as herein provided) at a yearly rent of Ten Dollars ($10) a year, payable in advance on the 1st day of June in each and every year, during the aforesaid term, subject, however, as aforesaid to all the covenants and conditions herein contained to be kept and performed on behalf of the Lessee, including the conditions under which this lease may be terminated and the term thereunder terminated or forfeited to the Lessor prior to December 19, A. D. 2004, all of which conditions, provisions and limitations are to be strictly construed in accordance with their terms for the benefit of the Lessor and against the Lessee, its successors and assigns, and all of which the Lessee agrees to keep, observe and perform. The Lessor hereby acknowledges receipt of the yearly rent due June 1, 1922, for the first year of such term, or to and until June 1, 1923.

First. The premises and personal property hereby demised to the Lessee for the term aforesaid and subject to all the conditions herein contained, are as follows, viz:

All and singular the machinery, fixtures, tools and other equipment now located in the building known as the Pilliod Mill (situated near Lock No. 44 on the Miami and Erie Canal and on the so-called Peter Minor, Senior, Reserve, which Mill is located upon the property described in Para-

graph "I" of the description of the Deed, bearing date of April 3rd, 1922 and recorded on May 29, 1922 in the office of the Recorder of Deeds of Lucas County, Ohio, in Deed Book No. 573 at page 384, which machinery, fixtures, tools and other equipment aforesaid are not used or useful for electrical purposes or for the generation or transmission of electrical power or energy, but which are useful and in use for the purpose of the grist or flour mill operated in such Mill Building; together with a right, subject to the conditions and restrictions hereinafter mentioned, described and defined, to the lessee at all times to have joint access with [fol. 56] the lessor to, and joint possession with the lessor of that part of the Mill Building in which the said grist mill machinery, fixtures and stationary equipment is at present located or which at present may be used or fitted and intended for the storage of grain, meal, grist or flour for the purpose of permitting the said lessee, its successors or assigns to operate the said grist mill and to derive the revenue or income therefrom; and together with a right of way from the public road in front of said Pilliod Mill Building into the said mill and all parts thereof, now used or occupied for grist mill purposes as aforesaid, for the use of the lessee, its successors and assigns, and the customers of the mill into that part of said Pilliod Mill Building hereby intended to be demised, and together with the right to said lessee, its successors and assigns to take sufficient water (when not required by the lessor hereunder for its hydro-electrical purposes) from the Miami & Erie Canal to be used through the existing mill-race now passing under said mill, to turn one turbine wheel (of the existing wheels now installed) for the purpose of running the machinery of the grist mill or if said existing wheel shall be replaced or renewed, such right to the water shall be limited to a right to turn one turbine wheel not exceeding four feet in diameter and not exceeding two feet in height (to be placed in position of one of present existing wheels and as approved by the lessor) for not exceeding ten hours per day, when the water is not required for the hydro-electrical purposes of the lessor, of which condition the lessor shall be the sole judge.

Second. It is further understood and agreed between the parties hereto and these presents are in all respects sub-

ject to the following stipulations, provisions and conditions, upon the happening of any of which the term demised shall cease and determine, namely:

(a) If and in case the Lessee or its successors in interest, shall at any time discontinue and cease to use the machinery, fixtures, tools and equipment now used in the grinding of grist and flour and abandon the use as a grist mill for the duration of one year, the rights of said Lessee under this lease and the term of this lease shall ipso facto cease and determine at the end of such year.

(b) If and in case the said Mill Building shall be destroyed by fire, storm, flood or casualty, and shall not be rebuilt, repaired and put in operation again as a grist mill by and at the expense of the Lessee (upon the same site and location as and of no greater size and capacity than the present mill) within one year from the date of such destruction, all of said rights hereby demised to said Lessee [fol. 57] shall ipso facto cease and determine at the end of such year.

(c) If the Public Utilities Commission of the State of Ohio, or the successor of such Commission having the same or similar functions, shall at any time determine that the use of the rights hereby demised to the Lessee for grist mill purposes, (either as hereby demised or as actually made use of in operation) shall be inconsistent or interfere with the right of the Lessor hereunder to use any or all its property (including its water rights) as it may require, for electrical purposes, or shall be inconsistent with or interfere with the full and complete use and operation of the electrical utility property formerly known as the Grand Rapids-Weston Light & Power Company, authorized and intended to be conveyed to the Lessor for its full use and benefit by said Order No. 2466 of said Public Utilities Commission of the State of Ohio, then ipso facto upon the making of any such Order by the Public Utilities Commission of the State of Ohio, or upon any notice to the Lessee or its successors in interest hereunder, given either by the Public Utilities Commission of the State of Ohio or by the Lessor that such Order has been made by such Commission, then and in that case all rights of the Lessee or its succes-

sors in interest shall ip[illegible] facto cease and determine to the extent provided in said Order.

(d) It is expressly understood and agreed that the use hereby leased and demised of water from the Miami & Erie Canal for grist mill purposes shall be at all times secondary, subject and subordinate to the right of the Lessor to the use of water for its hydro-electric power plant purposes, and if and in case the Lessee or its representative from time to time in charge or control of the grist mill are notified in any manner, whether formally or informally, orally or in writing, that water must not be used for a certain time or period for grist mill purposes and shall wilfully disregard such notice (of which the Board of Directors of the Lessor shall be the sole judge) then and in that case all rights of the Lessee under this lease shall at the option of the Lessor forthwith ipso facto cease and determine.

[fol. 58] It is expressly understood and agreed that the Lessee and its successors in interest hereunder, shall at their own expense, during the term of this lease repair and keep in good repair all the machinery, fixtures, tools and equipment pertaining to the grist mill use (including such turbine water wheel as may from time to time be connected with and used in the grist mill purposes) and shall also repair and keep in good repair that portion of the Mill Building which houses, protects or covers the grist mill machinery and the storage spaces in said mill used for the storage of grain, meal, grist or flour and hereby demised, and the determination of the Board of Directors of the Lessor as to whether this covenant is fully complied with shall at all times be binding and conclusive upon the Lessee and its successors in interest hereunder, and if, in any case, at any time the Board of Directors of the Lessor shall determine and give notice or cause notice to be given to the Lessee or its successors in interest that certain repairs are required to be made to that part of the Mill Building or machinery demised or occupied or in use hereunder for grist mill purposes, and the Lessee or its successors in interest shall fail within a reasonable time to be designated by the Lessor in such notice, (or if no time be designated then within sixty days from the giving of such notice) to

make the repairs determined to be necessary as aforesaid, then and in that case, all rights of the Lessee under this lease shall at the option of the Lessor, forthwith ipso facto cease and determine.

It is expressly understood and agreed that this lease and all rights of the Lessee and its successors in interest in and to the same and the rights and term hereby demised are in all respects subject and subordinate to the lien of the Mortgage or Deed of Trust made by the Lessor under date of September 1st, 1912 to Guaranty Trust Company of New York as Trustee, and its supplements, whether heretofore or hereafter recorded, securing the First Mortgage 5% Gold Bonds of the Lessor heretofore or hereafter issued, and also that this lease and all rights of the Lessee hereunder are likewise subject and subordinate to the lien of the Mortgage or Deed of Trust made by the Lessor under date of February 1st, 1922 to The Equitable Trust Company of [fol. 59] New York as Trustee, and its supplements, whether heretofore or hereafter recorded, securing the First Lien and Refunding Bonds of the Lessor, whether heretofore or hereafter issued, and that the rights of the Lessee hereunder may be terminable as in said Deeds of Trust or either of them respectively provided, with regard to leasehold interests in this nature, which are subject and subordinate thereto.

Third. The Lessee for itself and its successors in interest expressly covenants and agrees that it will indemnify and hold harmless the Lessor hereunder against any and all claims arising by reason of the use and occupation of the said demised premises for grist mill purposes, including any and all claims that may or might arise or be at any time made against the Lessor for damages to person or property or by reason of any accident, happening or cause whatsoever that may happen or occur upon, in or about the demised premises, that are at the time such accident, happening or cause occurs due to the occupation of the demised premises or any part of same or any part of said Providence Mill property or the land upon which the same is located, for purposes of a grist mill. The Lessee further agrees that it will at no time occupy the demised premises for any purposes other than a grist or flour mill and that it will comply with all laws of the United States and of the

State of Ohio and all local ordinances of any County, Village or Municipality relating to such occupancy of such demised premises.

Fourth. The Lessee shall not assign this lease nor make any alterations on the premises, without the Lessor's consent in writing; nor shall the Lessee underlet or underlease the premises or any part thereof, except to some person, firm or corporation approved by the Lessor. The Lessor or its agents shall have the right to enter upon the demised premises or any part thereof at all reasonable hours for the purpose of examining the same or making such repairs or alterations therein as may be necessary for the safety and preservation thereof. No sign shall be placed on the demised premises except of such a kind and character as from time to time may be approved by the Lessor.

Fifth. The Lessor shall not be liable for any damage or injury by water or electricity or any cause whatsoever which may be sustained by the Lessee or any person or persons whatsoever in or about the demised premises.

[fol. 60] Sixth. This lease may be cancelled and the term thereof caused to expire by the Lessor at any time on thirty days' written notice to the Lessee, upon payment to the Lessee of the sum of Ten thousand dollars ($10,000) less a deduction equal to the aggregate of One hundred dollars ($100) for each twelve months that shall have elapsed from the date of the commencement of the term to the date of such notice.

Seventh. No waiver, express or implied, of any covenant or condition herein or of any breach thereof, or any consent given by the Lessor, shall be held to waive or impair any provision or condition of this lease or any right of the Lessor as to any future act or omission (similar or dissimilar) by the Lessee or any one in possession or upon the demised premises.

Eighth. This agreement and all its provisions and conditions shall extend to and enure to the benefit of the successors and assigns of the Lessor, and of the successors and assigns of the Lessee.

Ninth. The Lessor covenants that the Lessee on paying the said rent and performing the covenants aforesaid, shall

and may peaceably and quitely have, hold and enjoy the said demised premises for the term aforesaid, subject to the provisions, conditions and conditional limitations aforesaid.

In witness whereof, said Lessor has caused its corporate seal to be hereunto duly affixed and this instrument to be duly signed on its behalf by its Vice-President and Secretary, both thereunto duly authorized, and the Lessee has similarly executed the same all as of the day and date first herein mentioned.

The Defiance Gas & Electric Company, by —— ——, Vice-President. —— ——, Secretary. The Providence Mill Company, by —— ——, President.

[fol. 61] State of ——,
County of ——:

On the — day of ——, 1922, before me personally appeared —— —— and Albert B. Muller, both to me known and known to me to be respectively the Vice-President and Secretary of The Defiance Gas & Electric Company, and who being by me duly and severally sworn, did depose and say that he, —— ——, resides in ——, and that he Albert B. Muller, resides in Defiance, Ohio; that they are respectively the Vice-President and Secretary of The Defiance Gas & Electric Company, the Corporation described in and which executed the foregoing lease; that they know the seal of said Corporation; that the seal affixed to said lease is such corporate seal; that it was so affixed and affixed by them by order of the Board of Directors of said Corporation and that they signed their names thereto by like order. And they severally acknowledged said lease to be the free act and corporate deed of said Corporation and of themselves as such Vice-President and Secretary respectively, for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and official seal the day and date aforesaid.

—— ——.

State of ——,
County of ——:

On the — day of ——, 1922, before me personally appeared —— —— and —— ——, both to me known and

known to me to be respectively the Vice-President and Secretary of The Providence Mill Company, and who being by me duly and severally sworn, did depose and say that he, —— ——, resides in ——, and that he, —— ——, resides in ——; that they are respectively the Vice-President and Secretary of The Providence Mill Company, the Corporation described in and which executed the foregoing lease; that they know the seal of said Corporation; that the seal affixed to said lease is such corporate seal; that it was so affixed and affixed by them by order of the Board of Directors of said Corporation, and that they signed their names hereto by like order. And they severally acknowledged said lease to be the free act and corporate deed of said corporation and of themselves as such Vice-President and Secretary respectively, for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and official seal the day and date aforesaid.

—— ——.

[fol. 62] STIPULATION EXHIBIT No. 4

In the District Court of the United States, Southern District of Ohio, Eastern Division

No. 572. In Equity

THE PROVIDENCE MILL COMPANY, Plaintiff,
vs.
GEORGE F. SCHLESSINGER et al., Defendants

Under the stipulation between the parties hereto, plaintiff offers in evidence sections from the constitutions of Ohio and the general and special laws of Ohio and Indiana and the Congress of the United States listed as follows:

1. Section 1 of Article I of the Constitution of Ohio of 1802.

2. Section 12 of Article VIII of the Constitution of Ohio, as adopted in 1851.

3. Section 12 of Article VIII of the Constitution of Ohio, as amended September 3, 1912.

Acts of the General Assemblies of Ohio and Indiana and of Congress of the United States

4. Act passed February 23, 1820, 18 O. L. 147, Vol. 2, Chase's Statutes, page 1131, entitled: "An act respecting a navigable communication between Lake Erie and the Ohio River."

5. Act passed January 31, 1822, 20 O. L. 31, Vol. 2, Chase's Statutes, page 1220, entitled: "An act authorizing an examination into the practicability of connecting Lake Erie with the Ohio River by a canal."

6. Act passed January 27, 1823, 21 O. L. 24, Vol. 2, Chase's Statutes, page 1255, entitled: "An act supplementary to the act," last above mentioned.

7. "An act in addition to the act authorizing an examination into the practicability of connecting Lake Erie with the Ohio River by a canal," passed February 23, 1824, Vol. 3, Chase's Statutes, page 1963.

8. Act passed February 4, 1825, 23 O. L. 50, Vol. 2, Chase's Statutes, pages 1472-76, entitled: "An act to provide for the internal improvement of the State of Ohio by navigable canals."

[fol. 63] 9. An act supplementary to the above acts, passed January 18, 1826, Vol. 3, Chase's Statutes, page 1516.

10. "An act for the protection of the Ohio canals," passed January 31, 1826, Chase's Statutes, Vol. 3, page 1525.

11. "An act to provide for the increase of the Canal Fund by the purchase and sale of real estate," passed February 7, 1826, Vol. 3 Chase's Statutes, page 1527.

12. "And act in addition to the act entitled an act supplementary to the act providing for the internal improvement of the State of Ohio by navigable canals," passed February 8, 1826, Vol. 3 Chase's Statutes, page 1528.

13. Act of the Congress of the United States, passed March 2, 1827, granting lands in the State of Ohio to the State of Indiana, for construction of Wabash & Erie Canal.

14. "An act to amend the act for the protection of the Ohio canals," pased February 11, 1828, Chase's Statutes, Vol. 3, page 1598.

15. An act by the Congress of the United States, passed May 24, 1828, Vol. 4 Statutes at Large, page 305, donating lands in Ohio to the State of Ohio to be sold to provide funds to construct the Miami Extension Canal from Dayton, Ohio to Lake Erie.

16. "An act declaring the assent of the State of Ohio to the provisions and conditions of an Act of Congress," passed December 22, 1828, Chase's Statutes, Vol. 3, page 1619. Through this act the Legislature of Ohio assented to and accepted the terms and conditions of the Act of Congress passed May 24, 1828.

17. "An act to authorize Canal Commissioners to examine into the practicability of extending the Miami line of canal from Mad River, near Dayton, to Defiance at mouth of Auglaize River," passed February 9, 1830, Chase's Statutes, Vol. 3, page 1644.

18. "An act in addition to the several acts for the protection of the Ohio canals and for other purposes," passed February 18, 1830, Chase's Statutes, Vol 3, page 1659.

19. "An act constituting proceeds from sales of canal lands a portion of the general Canal Fund," passed February 23, 1830, 28 O. L. 61.

20. An act of the Congress of United States extending to the State of Ohio the time in which to complete the canal from Dayton to Lake Erie, passed April 2, 1830, Vol. 4 Statutes at Large, page 393.

21. "An act to provide for the purchase of water privileges," passed March 3, 1831, Chase's Statutes, Vol. 3, page 1862.

22. "An act to authorize the selection, location, sale and application of the proceeds of lands granted by Congress to aid the State of Ohio in extending the Miami Canal," passed December 31, 1831, Chase's Statutes, Vol. 3, page 1915, 30 O. L. 14.

[fol. 64] 23. "An act to amend the act to provide for the internal improvement of the State of Ohio by navigable canals," passed February 13, 1832, Chase's Statutes, Vol. 3, page 1917.

24. Resolution by the General Assembly of the State of Indiana conveying to the State of Ohio the lands theretofore granted by Congress to the State of Indiana for construction of Wabash & Erie Canal, passed February 1, 1834.

25. Resolution by the General Assembly of the State of Ohio, passed February 24, 1834, accepting the conveyance of Ohio lands by the State of Indiana to the State of Ohio, which conveyance by Indiana was made pursuant to and under authority of Section 4 of the Act of Congress above mentioned, passed May 24, 1828, Vol. 4 Statutes at Large, page 305.

26. An act providing that all moneys arising from the sale of lands, together with the net proceeds of all tolls, fines and water rents derived from the canal north of Dayton, should be subject to Commissioners of Canal Fund, passed February 27, 1834, 32 O. L. 213.

27. An act directing the Board of Public Works of Ohio to establish the line of the Wabash & Erie Canal from the east line of the State of Indiana to suitable point into Lake Erie, and put the work under contract and carry it along as funds from the sale of land should be received or other money supplied, passed March 3, 1834, 32 O. L. 308.

28. "An act to provide for the extension and completion of the Miami Canal north of Dayton," passed March 8, 1836, 34 O. L. 331.

29. An act appropriating money for the purchase of suitable lands for hydraulic purposes, passed January 12, 1837, 35 O. L. 6.

30. An act appropriating money for purchase of lands and developing of hydraulic power on Miami Canal from Ohio River to Defiance, passed April 3, 1837.

31. "An act relating to the management and sale of certain lands of the State of Ohio," passed March 19, 1838, 36

O. L. 85, Swan's Statutes of Ohio 1841, pages 166 to 170 inclusive.

32. "An act to provide for the protection of the canals of the State of Ohio; the regulation of the navigation thereof and for the collection of tolls," passed March 23, 1840, 38 O. L. 87, Swan's Statutes of Ohio 1841, pages 174 to 200.

33. Swan's Statutes of Ohio of 1841, pages 744 to 764 inclusive.

34. An act directing Board of Public Works to select such of the canal lands belonging to Ohio as might be neces- [fol. 65] sary for the use of water power on the Wabash & Erie Canal and the Miami Canal, passed March 7, 1842, 40 O. L. 72.

35. An act providing for the completion of all parts of the Miami Extension Canal not then under contract, passed February 28, 1843, 41 O. L. 43.

36. "An act in relation to the Miami Canal, the Miami Extension and the Wabash & Erie Canal," passed March 14, 1849, 47 O. L. 44.

37. Revised Statutes of 1880, Sections 7775 to 7779 inclusive, Bates' Annotated Statutes of 1906, Section 218-86 et seq.

38. General Code of 1910, Sections 14009 to 14013 inclusive.

39. "An act to amend Section 14009 of the General Code relating to the sale and leasing of surplus waters of the canals, feeders and dams of the State," passed March 21, 1917, 107 O. L. 418.

Leasing of Entire Public Works

40. "An act to provide for the leasing of the public works of the State," passed May 8, 1861, 58 O. L. 117.

41. Joint resolution of the General Assembly of Ohio extending the lease provided for in the above mentioned act for a period of ten years, passed April 11, 1867, 64 O. L. 330.

Abandonment Acts

42. "An act to authorize the city of Cincinnati to enter upon and occupy a part of the Miami & Erie Canal as a public highway and for sewerage purposes," passed March 24, 1863, 60 O. L. 44.

43. "An act to authorize the city of Toledo to enter upon and occupy a part of the Miami & Erie Canal as a public highway and for sewerage and water purposes," passed March 26, 1864, 61 O. L. 74.

44. "An act to provide for the vacation of the Grandville side-cut, known as the Grandville feeder, emptying into the summit level of the Ohio canal in Licking County," passed April 11, 1866, 73 O. L. 198.

45. "An act to authorize the vacation and sale of a portion of the Hocking canal," passed March 6, 1873, 70 O. L. 306.

46. "An act to provide for the abandonment of a certain portion of the Hocking canal lying eastward of the lock at the village of Chauncey, Athens County," passed April 11, 1876, 73 O. L. 168.

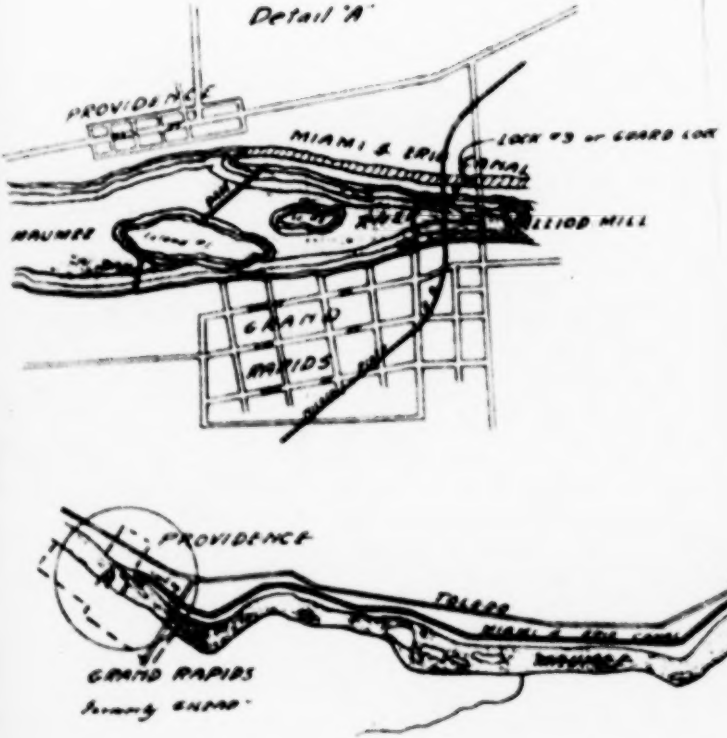
47. "An act to provide for the abandonment and sale of the Wabash & Erie Canal and six-mile reservoir in Paulding County," passed April 12, 1888, 85 O. L. 207.

[fol. 66] 48. "An act to abandon the Wabash & Erie Canal in Paulding County," passed March 3, 1891, 88 O. L. 72.

49. "An act to provide for the abandonment of the Hocking canal for canal purposes and for leasing the same to the Columbus, Hocking Valley & Athens Railroad Co.," passed May 18, 1894, 91 O. L. 327.

50. "An act to provide for the abandonment of the Walhonding canal," passed April 27, 1896, 92 O. L. 380.

51. "An act to abandon a portion of the Miami & Erie Canal in Lucas County and to provide for the sale or lease of the same to the city of Toledo, Ohio," passed January 22, 1920, 108 O. L., part 2, pages 1138 to 1141.


Detail "A"
PROVIDENCE
MIAMI & ERIE CANAL
LOCK #3 or GUARD LOCK
OLD RIVER
HILLTOP HILL
RAILROAD
GRAND RAPIDS
PROVIDENCE
TOLEDO
MIAMI & ERIE CANAL
GRAND RAPIDS

STIPULATION EXHIBIT NO. 5

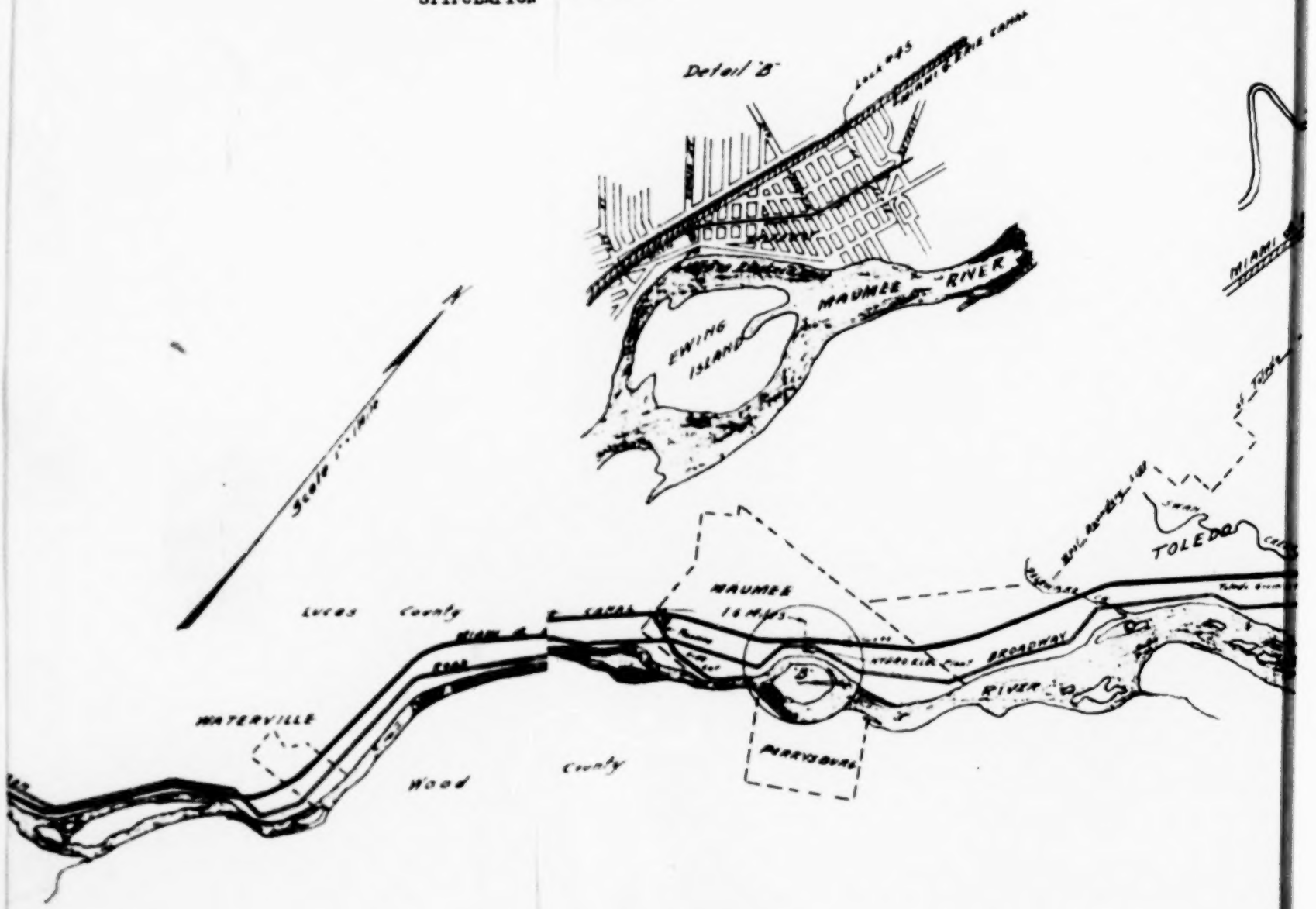
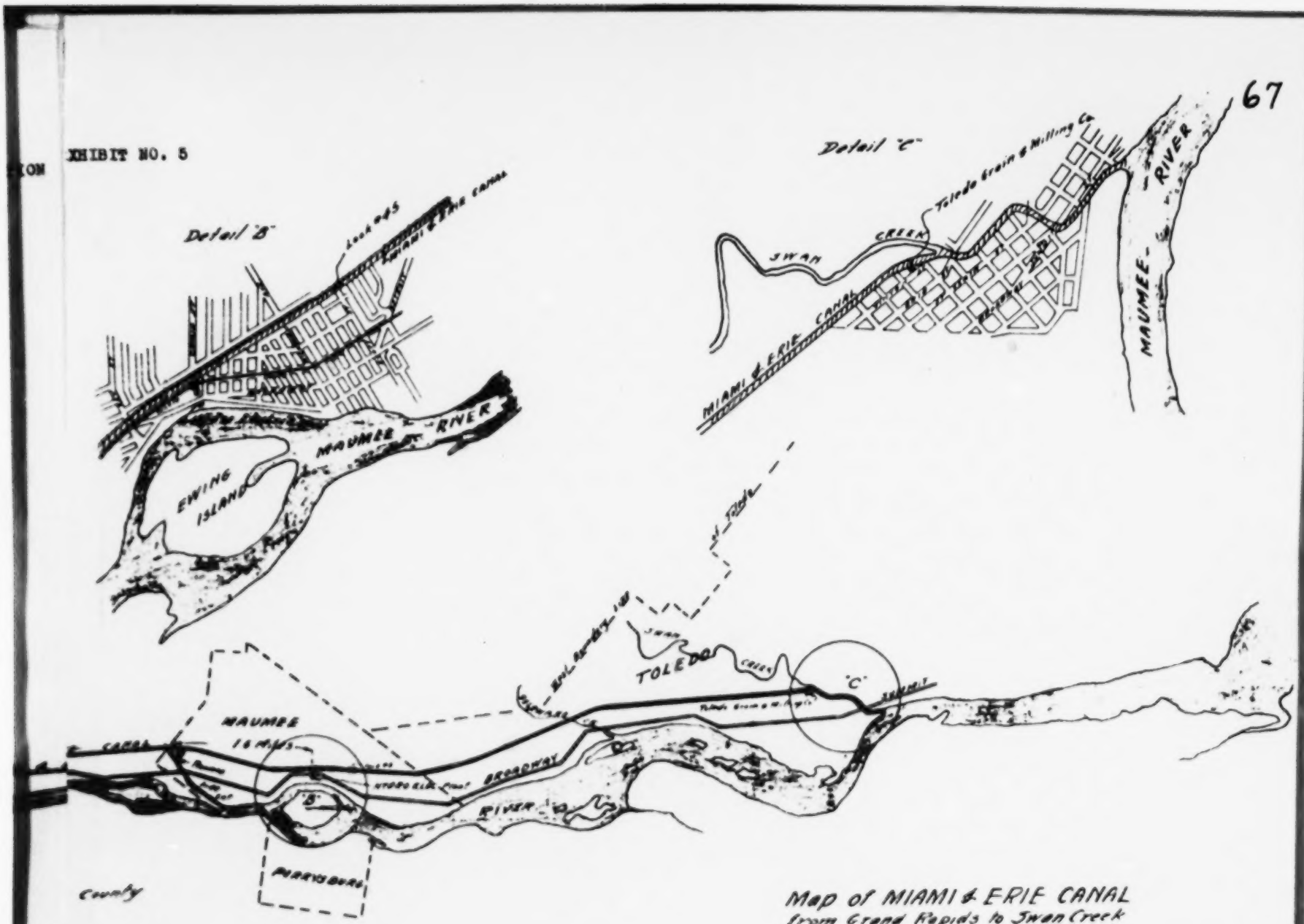


EXHIBIT NO. 5



Map of MIAMI & ERIE CANAL
from Grand Rapids to Swan Creek
Lucas County, Ohio

508-26

52. "An act to abandon for canal purposes that portion of the Miami & Erie Canal between the Maumee River at Defiance, Defiance County, Ohio, and a point five hundred feet north of the Middletown dam, near the north corporation line of the city of Middletown, Ohio, and to provide for the leasing of certain portions of the same to cities, villages and other political subdivisions of the State and for granting of leases outside of municipalities, etc.," passed March 25, 1925, 111 O. L. 208 to 214.

53. "An act to abandon a portion of the Miami & Erie Canal in Lucas County, Ohio, and to provide for the sale of the same to the County Commissioners of Lucas County, Ohio," passed March 27, 1925, 111 O. L. 367 to 370.

54. "An act to abandon for canal and hydraulic purposes that portion of the Miami & Erie Canal from a point five hundred feet north of the State Dam, near the corporation line of the city of Middletown, Paulding County, Ohio to the present terminus of said canal at St. Bernard in the city of Cincinnati, Hamilton County, Ohio," passed April 21, 1927, 112 O. L. 388 to 390.

55. "An act to abandon a portion of the Miami & Erie Canal in Lucas County, Ohio, and to devote the same to highway and other purposes and to repeal all acts in conflict therewith," passed over the Governor's veto May 11, 1927, 112 O. L. 360 to 363.

(Here follows Stipulation Exhibit No. 5, marked side folio page 67)

[fol. 68] In United States District Court

[Title omitted]

Interlocutory Injunction Order—Filed April 14, 1928

At Columbus, in said District, Before the Honorable Maurice H. Donahue, Circuit Judge, the Honorable Smith Hickenlooper, and the Honorable Benson W. Hough, District Judges

The hearing of the application of the plaintiff for an interlocutory injunction herein, having been fixed for 9:30

[fol. 69] o'clock A. M. on the 14th day of April, 1928, in the Federal Building at Columbus, Ohio, in said District, and due notice of such hearing having been given to the Honorable Vic Donahey, Governor of the State of Ohio, and to the Honorable Edward C. Turner, Attorney General of the State of Ohio, and to all of the persons who are defendants in this suit, towit, George F. Schlessinger, individually and as Director of the Department of Highways of the State of Ohio, Richard D. Wisda, individually and as Superintendent and Director of the Department of Public Works of the State of Ohio, and Roy E. Davis, Ralph E. Farnsworth and George R. Hoffman, individually and as County Commissioners of Lucas County, Ohio; and each and all of the foregoing persons and parties having acknowledged the service of such notice, said application came on to be heard on said date and at the time and place aforesaid before the Honorable Maurice H. Donahue, a Circuit Judge, the Honorable Smith Hickenlooper and the Honorable Benson W. Hough, District Judges, constituting a special statutory court under the provisions of Section 266 of the Federal Judicial Code, for an interlocutory injunction against the defendants restraining and suspending the enforcement, operation and execution of a statute (hereinafter more particularly referred to) of the State of Ohio, upon the ground of its unconstitutionality, in accordance with the prayer of the bill of complaint; and it appearing to the Court that the plaintiff is the owner of a flour and feed mill situated on the Miami and Erie Canal near the point where said canal emerges from the Maumee River at the village of Providence in Lucas County, Ohio; that said mill is operated by water power generated by water taken from said canal pursuant to a conveyance of the same from the State of Ohio [fol. 70] to plaintiff's predecessor in title, his heirs and assigns forever; that the value of said water power is in excess of the sum of $75,000, exclusive of the value of said flour and feed mill; that under the act of the General Assembly of the State of Ohio, dated the 11th day of May, 1907, and published in 112 Ohio Laws, page 350, the defendants propose to, and unless enjoined by the Court, will, drain the water from said portion of said canal, fill up and otherwise obstruct said portion and prevent further water of the Maumee River from flowing into or through the

same, thereby destroying plaintiff's said water power, to its great and irreparable damage; that as against the threatened acts of the defendants as aforesaid the plaintiff has no adequate remedy at law and that an interlocutory injunction should issue enjoining the defendants and each of them as prayed for in the bill of complaint herein; it is therefore ordered that the defendants and each of them and all of their officers, agents, associates, appointees and employees, respectively, be and they hereby are temporarily enjoined and restrained from in any way preventing, interrupting, lessening, interfering with or otherwise abridging or injuriously affecting (a) the use by the plaintiff of the canal water in that portion of the Miami and Erie Canal extending from the state dam and the intake adjacent thereto, located in the Maumee River immediately south of Providence, Ohio, to the said mill of the plaintiff located on said canal approximately one-half mile northeasterly of the same; (b) the flowage of water from said river into said canal at said dam and intake; (c) also, from diverting, causing or permitting to be diverted, either into said river or otherwise and whether at said dam or elsewhere [fol. 71] where, any of the water of said canal which, except for such diversion, would and will be available to the plaintiff in said canal at its said mill; (d) from opening or causing or permitting to be opened, any sluice gate or passage, the opening of which would or will lessen or otherwise injuriously affect either the volume or flowage of water in said portion of said canal between the points in (a) first aforesaid; (e) from closing or obstructing, whether wholly or partially, any gate or passage now available or usable for the conveyance of water from said river into said portion of said canal; (f) from constructing or erecting or from causing or permitting to be constructed and erected any bulkhead, dam or other structure or obstruction, the purpose or result of which would be to prevent or lessen the flow of water in any part of said portion of said canal; and from doing, suffering or permitting any other act or thing in any way violative of the rights of the plaintiff secured to it under and by virtue of the said grant of water power executed by the State of Ohio to plaintiff's predecessor, his heirs and assigns forever, as aforesaid—all until

the final hearing and determination of this cause or until the further order of this court.

It is further ordered that this interlocutory injunction order shall take effect upon the giving by the plaintiff of a bond in the sum of $2,000.00, executed with sufficient surety to the approval of the Clerk of this court, conditioned to secure the defendants and each of them the damages they may sustain, if it be finally decided that this interlocutory injunction should not have been granted.

Thereupon the plaintiff tendered to the Clerk of this court its said bond in said sum, executed by the Metropoli- [fol. 72] tan Casualty Insurance Company of New York, as surety, and the same was duly approved as aforesaid. All of which is done as of the said 14th day of April, 1928.

Maurice H. Donahue, United States Circuit Judge for the Sixth Circuit. Smith Hickenlooper, United States District Judge. Benson W. Hough, United States District Judge.

Approved: L. W. Hunt, Solicitor for Roy. E. Davis, Ralph E. Farnsworth, and George R. Hoffman, individually and as County Commissioners of Lucas County, Ohio. Edward C. Turner, Attorney General of Ohio; A. M. Colland and J. A. Godown, Special Counsel, Solicitors for George F. Schlessinger, individually and as director of the Department of Highways of the State of Ohio, and Richard D. Wisda, Individually and as Supt. and Director of the Department of Public Works of the State of Ohio.

[fols. 73-75] Bond on interlocutory injunction for $2,000, approved and filed November 2, 1928, omitted in printing.

[fol. 76] In United States District Court

[Title omitted]

Before Donahue, Circuit Judge, Hickenlooper and Hough, District Judges

(Under Authority of Section 266 Judicial Code)

Opinion—Filed Sept. 7, 1928

Hough, District Judge:

The plaintiff company, a corporation, seeks injunction, enjoining the defendant Schlesinger, as Director of the

Department of Highways of the State of Ohio, and as Superintendent and Director of the Department of Public Works of said state, from carrying out the mandate of the General Assembly of Ohio, contained in an Act passed by it on the 11th day of May, 1927 (112 O. L., 360). That mandate directed the said defendant officer of the state, to drain the water from a section of the Miami & Erie Canal, designated as Lineal Part 2, and to prevent the water of the Maumee River from flowing into such section.

[fol. 77] The claims of the plaintiff company are founded upon a grant in perpetuity to one Minor, of September 1st, 1842, which was made in settlement of the claims of Minor arising from the appropriation and destruction of his private dam, mill race and mill, during the original construction of the canal by the State of Ohio.

A full statement of the case is found and the conclusions under the issues presented, follow and conform to the decision of the case of the Maumee Valley Electric Company v. Schlesinger as Superintendent of Public Works and Director of the Department of Highways and Public Works of the State of Ohio, and others, No. 534 In Equity, this day handed down, and to which reference is herein made, and upon the further authority of the case of State ex rel. vs. The Middletown Hydraulic Company, (114 O. S., 437), which case presented a like situation.

Prayer of petition granted and injunction allowed.

Donahue, Circuit Judge, Hickenlooper, District Judge, concur.

[fol. 78] In United States District Court

[Title omitted]

Motion to Substitute Party Defendant—Filed Sep. 6, 1928

Now comes the plaintiff and respectfully represents and shows to the court that since the institution of the above entitled suit on March —, 1928, and during the pendency of said suit said defendant, George F. Schlessinger, resigned from the office of Director of Highways of the State of Ohio on June 15, 1928 and on that day ceased to hold said office,

and plaintiff further represents that on said date of June 15, 1928 one Harry J. Kirk was duly appointed to said office of Director of Highways of the State of Ohio; that he thereupon duly qualified as such officer under the laws of Ohio and since then he has been and he still is the duly appointed, qualified and acting Director of Highways of the State of Ohio as the successor in said office to said George F. Schlessinger, resigned as aforesaid.

Plaintiff further represents that there are grave and difficult questions involved in said suit and that there is substantial need for continuing and maintaining said cause and obtaining an adjudication of the questions involved in order that plaintiff's property rights of great value involved in said suit may be properly and finally determined.

Wherefore, plaintiff respectfully moves the court for an [fol. 79] order permitting and directing said suit to be continued and maintained against said Harry J. Kirk, as the Director of Highways of the State of Ohio and successor in that office to said George F. Schlessinger, resigned as aforesaid.

U. G. Denman and Karl G. Burr, Solicitors for Plaintiff.

To the Honorable the Judges in the above-entitled cause in the United States District Court for the Southern District of Ohio, Eastern Division:

The undersigned, Harry J. Kirk as Director of Highways of the State of Ohio, through his counsel, the Attorney General of Ohio, duly authorized under the laws of Ohio, hereby this Sixth day of September, 1928 acknowledges receipt of a copy of the above motion by the plaintiff in the above entitled cause, voluntarily enters his appearance as a defendant in said cause, and hereby expressly consents to the granting of said motion and that said cause be continued and maintained against him as the successor in the office of the Director of Highways of the State of Ohio to George F. Schlessinger resigned, in order that an adjudication of the questions involved in said cause may be obtained.

Harry J. Kirk, Director of Highways of the State of Ohio, by Edward C. Turner, Attorney General of Ohio.

[fol. 80] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER SUBSTITUTING HARRY J. KIRK AS PARTY DEFENDANT—
Filed Sept. 8, 1928

This day this cause came on to be heard on the motion of the plaintiff for an order to permit and direct the above entitled cause to be continued and maintained by the plaintiff against Harry J. Kirk, as successor in the office of the Director of Highways of the State of Ohio to his predecessor in that office, George F. Schlessinger resigned, and the court being fully advised in the premises finds that said George F. Schlessinger resigned from the office of Director of Highways of the State of Ohio on June 15, 1928 and on that day ceased holding said office as such officer; that said Harry *H.* Kirk is the duly appointed, qualified and acting Director of Highways of the State of Ohio as the successor in said office to said George F. Schlessinger, resigned as aforesaid; that said Harry J. Kirk has been duly notified of the filing and pendency of said motion; that he expressly consents to the granting thereof by this court and to a substitution of himself as such Director of Highways of the State of Ohio as a defendant in said cause in the place of his predecessor in said office, George F. Schlessinger, resigned as aforesaid; that there is substantial need for continuing and maintaining said cause and obtaining an adjudication of the questions involved therein; and that said above entitled cause should be permitted to be continued and maintained by the plaintiff against said Harry J. Kirk as such successor in said office of Director of highways of the State of Ohio.

Now, therefore, it is ordered that said cause be and the same hereby is continued and shall be maintained by the [fol. 81] plaintiff against said Harry J. Kirk as Director of Highways of the State of Ohio and as a defendant in this cause and that all orders heretofore entered by this court in said cause be and they hereby are continued and shall stand against said Harry J. Kirk as defendant as aforesaid in this cause and as the successor to said George F. Schlessinger in the office of the Director of Highways of the State of Ohio until the further orders of this court.

Maurice H. Donahue, Circuit Judge. —— ——, District Judge. Benson W. Hough, District Judge.

[fol. 82] In United States District Court

No. 572. In Equity

The Providence Mill Company, Plaintiff,

vs.

George F. Schlessinger, Individually and as Director of the Department of Highways of the State of Ohio; Richard D. Wisda, Individually and as Superintendent and Director of the Department of Public Works of the State of Ohio, and Roy E. Davis, Ralph E. Farnsworth, and George R. Hoffman, Individually and as County Commissioners of Lucas County, Ohio, Defendants

Final Decree—Filed Dec. 3, 1928

This cause, coming on to be heard at this term on the pleadings, proofs and arguments of counsel, was thus heard before and was determined by Honorable Maurice H. Donahue, United States Circuit Judge, and Honorable Benson W. Hough and Honorable Smith Hickenlooper, United States District Judges, constituted and sitting as a court in this cause under Section 380 of Title 28 of the United States Code, formerly Section 266 of the United States Judicial Code, it being then agreed by and between counsel for all parties and the court that thereafter there should be filed in this cause the answers of the defendants and the stipulation and agreement between the parties, plaintiff and defendants, on the evidence, with the stipulation exhibits referred to therein and attached thereto, now filed herein; and thereupon, upon consideration thereof, former defendant George F. Schlessinger having resigned from and quit the office of Director of the Department of Highways of the State of Ohio on June 15, 1928, and Harry J. Kirk having been thereupon duly appointed under the laws of Ohio as Director of the Department of Highways of the State of Ohio and having been duly substituted as a defendant in this cause as such Director of the Department of Highways of said State succeeding said former defendant George F. [fol. 83] Schlessinger, resigned as aforesaid, and said Harry J. Kirk as Director of Highways as aforesaid having voluntarily entered his appearance in this cause as a defendant therein succeeding said George F. Schlessinger, resigned

as aforesaid, and said Harry J. Kirk being since such substitution and entry of appearance as aforesaid and now the duly appointed, qualified and acting Director of the Department of Highways of the State of Ohio, it is ordered, adjudged, and decreed as follows, viz:

1. That on the issues joined in this cause the court finds for the plaintiff and against the defendants, including therein that the provisions of the Act of the General Assembly of the State of Ohio, hereinafter specifically described mentioned and referred to, declaring or attempting to declare all leases, agreements and grants of and with and from the State of Ohio for water to be taken thereunder from that portion of the Miami and Erie Canal specifically described in said Act, to be null, void and of no effect and directing the State Highway Director of Ohio to drain the water out of said portion of said canal and to prevent the waters of the Maumee River from flowing into said portions of said canal and granting permission to the defendants to fill up said canal and obstruct the flow of the waters therein, are contrary to and in contravention of the Constitution of the United States and therefore null, void and of no effect with respect to and as affecting, or intended to affect, the leases, agreements and grants mentioned, described, referred to and set out in the Bill of Complaint and the record of this cause, namely, the agreement and grant between Peter Minor and the State of Ohio of September 1, 1842, as readjusted by the proceedings between said Minor and the State of Ohio through its then Board of Public Works on February 10, 1846, and the lease from The Defiance Gas & Electric Company, successor in title to the rights of said Peter Minor under said agreement and grant of September 1, 1842, as readjusted as aforesaid on February 10, 1846, to the plaintiff in this cause, which lease to the plaintiff herein expires by its terms on the 19th day of December, A. D. 2004.

[fol. 84] 2. And that the defendant Harry J. Kirk, Director of Highways as aforesaid, and each of said other defendants and his and their successor, respectively, and his and their officers, agents, associates, appointees and employees and their respective successors in office and position be and they hereby are, during the existence of plaintiff's

said lease, agreement and grant, expiring as aforesaid, enjoined (a) from in any way or by any means draining or, except by the plaintiff, causing or permitting to be drained from that portion of the Miami and Erie Canal, or any part thereof, described as commencing at the guard lock, so-called, and otherwise known as lock No. 9 and lock No. 44 of said canal, and extending thence southwesterly over and along said Miami and Erie Canal, including the full width of the bed and banks thereof as defined by Buchanan's Survey, to and including the point or place where said canal joins with the Maumee River on the northwesterly side thereof and above or southwesterly from the Grand Rapids, Ohio State Dam in Providence Township, Lucas County, Ohio, and being a part of that portion of said Miami and Erie Canal as described and referred to in Section 1 of an Act of the General Assembly of Ohio, entitled "An act to abandon a portion of the Miami and Erie Canal in Lucas County, Ohio and to devote the same to highway and other purposes and to repeal all acts in conflict therewith," passed May 11, 1927 and found on pages 360 to 363 inclusive of Volume 112 of the Laws of Ohio, any of the waters of said canal which, except for such draining, would and will be available to the plaintiff in this cause for its use to the amount provided and called for in plaintiff's said lease, agreement and grant expiring on December 19, A. D. 2004 as aforesaid; and (b) from doing, or causing to be done, any act, matter or thing in any way or by any means with respect to said Maumee River, or said part above described of said Miami and Erie Canal as extending from said guard lock No. 9 to and including the point or place where said canal joins with said Maumee River, that would prevent or in anywise interfere with, or obstruct, the continuous flow into or [fol. 85] throughout the part of said canal described as aforesaid, of any of the waters of or from said Maumee River or of said part of said canal which, except for such prevention, obstruction or interference, would and will be available to the plaintiff in this cause for its use to the amount provided and called for in plaintiff's said lease, agreement and grant expiring as aforesaid.

It is further ordered, adjudged, and decreed that the plaintiff have and recover from the defendant Harry J. Kirk, as Director of the Department of Highways of the State of Ohio, its costs herein expended taxed at $—, for which execution is hereby awarded.

Smith Hickenlooper, District Judge. Benson W. Hough, U. S. District Judge.

Approved: Edward C. Turner, as Attorney General, and Albert M. Calland, Special Counsel, and Joseph A. Godown, Special Counsel, Solicitors for Defendants Kirk and Wisda. U. G. Denman and Karl E. Burr, Solicitors for Plaintiff.

[fol. 86] In United States District Court

[Title omitted]

Petition for Appeal to the Supreme Court of the United States—Filed Jan. 3, 1929

The defendants herein, conceiving themselves aggrieved by the decree made and entered on the 3rd day of December, 1928, in the above entitled cause, do each severally hereby appeal from said order and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors, which is filed herewith, and pray that cost bond on appeal be fixed and that a transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

Edward C. Turner, as Attorney General of Ohio; A. M. Calland and J. A. Godown, Special Counsel, Solicitors for the Defendant Harry J. Kirk, as Superintendent of the Department of Highways and Public Works of the State of Ohio. Leroy W. Hunt, as Prosecuting Attorney of Lucas County, Ohio; Herman A. Krueger, Assistant Prosecuting Atty., Solicitors for the Defendants Roy E. Davis, Ralph E. Farnsworth, and George R. Hoffman, as County Commissioners of Lucas County, Ohio.

[fol. 87] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Jan. 3, 1929

Now come the defendants herein and severally file the following assignment of errors upon which they will severally rely upon the prosecution of the appeal herein from the decree of this Honorable Court, dated December 3, 1928:

1. That the District Court erred in decreeing the Act of the General Assembly of Ohio, passed on May 11, 1927, 112 Ohio Laws 360-363, Sections 14178-14178-12, inclusive, of the General Code of Ohio, to be in contravention of and contrary to the Constitution of the United States so as to deprive plaintiff of rights without due process of law under leases and agreements referred to in the final decree of said District Court.

2. That the District Court erred in decreeing the Act of the General Assembly of Ohio, passed on May 11, 1927, 112 Ohio Laws 360-363, Sections 14178-14178-12, inclusive, of the General Code of Ohio, so as to impair the obligations of agreements and leases between plaintiff and the State of Ohio referred to in the final decree of said District Court in contravention of and contrary to the Constitution of the United States.

[fol. 88] 3. That the Act of the General Assembly of Ohio, passed on May 11, 1927, 112 Ohio Laws 360-363, Sections 14178-14178-12, inclusive, of the General Code of Ohio, is not in contravention of or contrary to the Constitution of the United States.

4. That the decree herein is contrary to the law.

Wherefore, the defendants severally pray that said decree be reversed.

Edward C. Turner, as Attorney General of Ohio; A. M. Calland and J. A. Godown, Special Counsel, Solicitors for the Defendant Harry J. Kirk, as Superintendent of the Department of Highways and Public Works of the State of Ohio. Leroy W. Hunt, as Prosecuting Attorney of Lucas County, Ohio; Herman A. Kreuger, Assistant Prosecuting Atty., Solicitors for the Defendants Roy E. Davis, Ralph E. Farnsworth, and George R. Hoffman, as County Commissioners of Lucas County, Ohio.

[fol. 89] In United States District Court

No. 572. In Equity

The Providence Mill Company, Plaintiff,

vs.

Harry J. Kirk, as Superintendent of Public Works and Director of the Department of Highways and Public Works of the State of Ohio, Successor to and Substituted for George F. Schlesinger, as Superintendent of Public Works and Director of the Department of Highways and Public Works of the State of Ohio, and Roy E. Davis, Ralph E. Farnsworth, and George R. Hoffman, as County Commissioners of Lucas County, Ohio, Defendants

Order Allowing Appeal—Filed Jan. 3, 1929

On application of defendants, it is ordered that an appeal to the Supreme Court of the United States from the final decree herein be, and the same is hereby, allowed, that a certified transcript of the record, testimony, exhibits, stipulations, and all proceedings be forthwith transmitted to said Supreme Court of the United States. It is further ordered that the bond on appeal be fixed at the sum of one thousand dollars ($1,000.00).

Benson W. Hough, Judge of the United States District Court, Southern District of Ohio.

[fols. 90-93] Bonds on appeal for $1,000.00, approved and filed January 3, 1929, omitted in printing.

[fols. 94 & 95] Citation, in usual form, showing service on U. G. Denman and Karl E. Burr, filed January 3, 1929, omitted in printing.

[fol. 96] In United States District Court

[Title omitted]

Præcipe for Transcript of Record on Appeal—Filed Jan. 3, 1929

To the Clerk:

Please prepare transcript of record on appeal in the above entitled cause for the Supreme Court of the United States, and include therein the following:

1. Title page.
2. Caption.
3. Bill of Complaint.
4. Answers of defendants.
5. Stipulation and agreement between the parties plaintiff defendant on the evidence, and the stipulation exhibits attached thereto numbered 1 to 5, both inclusive.
6. Order granting interlocutory injunction.
7. Bond of plaintiff.
8. Opinion of the Court.
9. Motion for the consent to the substitution of Harry J. Kirk, as party defendant.
10. Order substituting Harry J. Kirk, as party defendant.
11. Final decree of the Court.
12. Petition for appeal.
13. Assignment of errors.
14. Order of Court allowing appeal and fixing amount of appeal bond.
15. Bonds of defendants.
16. Copy of citation and acknowledgment of service thereof.
17. Præcipe for transcript of record.
18. Stipulation re certification of record.
19. Clerk's certificate showing what portions of the record are included by request of each party.

[fol. 97] Edward C. Turner, as Attorney General of Ohio; A. M. Calland and J. A. Godown, Special Counsel, Solicitors for the Defendant Harry J. Kirk, as Superintendent of the Department of Highways and Public Works of the State of Ohio. Leroy W. Hunt, as Prosecuting Attorney of Lucas County, Ohio; Herman A. Krenger, Assistant Pros. Atty., Solicitors for the Defendants Roy E. Davis, Ralph E. Farnsworth, and George R. Hoffman, as County Commissioners of Lucas County, Ohio.

Service of a copy of the foregoing præcipe is hereby acknowledged this 3rd day of January, 1929. All parts of the record desired by Appellee, The Providence Mill Company, are named in the Præcipe.

U. G. Denman, Karl E. Burr, Solicitors for Plaintiff.

[fol. 98] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE CERTIFICATION OF RECORD—Filed Jan. 3, 1929

In accordance with the General Rules of this court, it is hereby agreed by and between the parties by their respective counsel that the record as presented to the Clerk by the printer may be certified by the Clerk, as required by law, as a true, full and complete copy of the original pleadings, papers, exhibits and orders used on the trial of this cause, as set forth in the præcipe for transcript, without further comparison by the Clerk.

Edward C. Turner, as Attorney General of Ohio; A. M. Calland and J. A. Godown, Special Counsel, Solicitors for the Defendant Harry J. Kirk, as Superintendent of the Department of Highways and Public Works of the State of Ohio. Leroy W. Hunt, as Prosecuting Attorney of Lucas County, Ohio; Herman A. Kreuger, Assistant Prosecuting Attorney, Solicitors for the Defendants Roy E. Davis, Ralph E. Farnsworth, and George R. Hoffman, as County Commissioners of Lucas County, Ohio.

[fols. 99 & 99½] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 100 & 100a] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ENLARGING THE TIME FOR DOCKETING CASE AND FILING RECORD—Filed in Supreme Court Feb. 2, 1929

For good cause shown, the time to docket the above entitled case and file the record thereof with the Clerk of the Supreme Court of the United States is hereby enlarged until and including the 16th day of January, 1929.

Benson W. Hough, District Judge.

[fols. 100b & c] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ENLARGING THE TIME FOR DOCKETING CASE AND FILING RECORD—Filed in Supreme Court Feb. 2, 1929

For good cause shown, the time to docket the above entitled case and file the record thereof with the Clerk of the Supreme Court of the United States is hereby enlarged until and including the 2nd day of February, 1929.

Benson W. Hough, District Judge.

[fol. 100d] [File endorsement omitted.]

[fol. 101] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS AND DESIGNATION OF NECESSARY PARTS OF THE RECORD—Filed Feb. 16, 1929

The appellants contend that the act of the General Assembly of Ohio, passed May 11, 1927, and found in 112 Ohio Laws, p. 360, sections 14178, 14178-12, inclusive, of the General Code of Ohio, does not

(a) deprive plaintiff of any property or rights without due process of law;

(b) impair the obligation of any contract growing out of the leases, agreements and grants of the appellee.

Appellants' contention is based on the following:

In constructing and maintaining the Miami and Erie canal, as a part of the general canal system of the State of Ohio, the State of Ohio acted in a sovereign or governmental capacity. The leases of water from said canal for hydraulic power purposes were entirely incidental and subordinate to the main purpose and were therefore, also acts in a sovereign or governmental capacity.

Until the General Assembly of the State of Ohio determined and declared that the Miami and Erie canal, or any part thereof, should no longer be maintained, it continued to be a canal and the maintenance thereof continued to be a

[fol. 102] sovereign or governmental function. The actual cessation of transportation on the canal did not change its character. It continued to be a canal until the General Assembly of Ohio, by its act of May 11, 1927, declared that the *its character. It continued to be a canal until the General Assembly of Ohio, by its act of May 11, 1927, declared that the* property occupied by the canal should be devoted to another public purpose, to-wit, the construction of a highway.

All leases for hydraulic power purposes made from the time the canal was constructed until the General Assembly, by its act of May 11, 1927, declared the necessity of abandoning the canal and devoting the property to another public purpose, were made by the state in its sovereign or governmental capacity, and were all subject to the sovereign or governmental power of the state to abandon and discontinue the canal and use the property for other public purposes.

The State, having the right to abandon the canal for navigation purposes, upon the passage of the Act of May 11, 1927, had the right to withdraw the water from the canal without liability to appellee.

The State, having by the Act of May 11, 1927, declared the necessity of abandoning the canal, is required to return the water to the Maumee River at the point where the water is now run into the canal, so that the water will flow in its natural water-course, namely, the Maumee River, through the Villages of Waterville and Maumee, and a part of the City of Toledo.

The lease from the State of Ohio to the appellee was executed and delivered after the Supreme Court of Ohio and the Supreme Court of the United States had determined that the lease of surplus water of the canal would not impose upon the State an obligation to keep up the canal for the sole purpose of meeting the requirements of such lease, that the State was not required to maintain the canal for navigation for a longer period than public necessity seemed [fol. 103] to require; that whenever the public necessity no longer required the canal it might be abandoned, and if abandoned, the water might be withdrawn altogether, and that the withdrawaing of the water from the canal pursuant to abandonment created no liability in favor of the

owner of leases, except to forego the further collection of rents or refund a reasonable portion of so much of the rents as had been paid in advance.

The State, by receiving consideration on account of water lease, cannot thereby change to a public purpose the incidental use of supplying of water to holders of the leases; such incidental use of the canal is a private use as distinguished from a public one and continues as such notwithstanding the acts of any officers of the State.

The State, by its having made the lease and having accepted the considerations thereunder, cannot, in the absence of legislation expressly so declaring, change the public purpose of a canal from "navigation" to "furnishing water pursuant to water leases," even though the use of the canal for navigation purposes had been discontinued by the public.

The abandonment of the canal for navigation could not result from the lack of use thereof by the public, but must result from legislative enactment by the State, first declared by the act of May 11, 1927, as to the part of the canal here involved. The lease in question was executed under and pursuant to 38 Ohio Laws, 87, 113, enacted March 23, 1840. Pertinent sections are sections 20, 21, 22 and 23 of Chapter 23, Swan's Statutes of Ohio, 1841 (shown without change in sections 218-86-87-88-89 of Bates Revised Statutes, Fifth Edition, Sections 14009-10-11-12, General Code of Ohio, 1910), from which time until 1894 the canal was used by the general public for navigation purposes.

[fol. 104] The authority granted to the Board of Public Works by 38 Ohio Laws, 87-113, cannot be enlarged by implication as a result of the change of conditions after the enactment thereof by the General Assembly.

Therefore:

The appellee has no vested right to continue the use of the surplus water from said canal after the abandonment and discontinuance thereof by the state and has no property right therein for which it is entitled to compensation.

The sovereign or governmental power of the state to abandon or discontinue the Miami and Erie canal was a part of the lease, agreement and grant to the appellee, and the act of the General Assembly abandoning and discontinuing the canal is in accordance with the lease, agreement and grant and does not impair any provision thereof.

Appellants think the following parts of the record are necessary for the consideration of the points above set out:

1. Title page.
2. Caption.
3. Bill of Complaint.
4. Answers of defendants.
5. Stipulation and agreement between the parties plaintiff and defendant on the evidence, and the stipulation exhibits attached thereto numbered 1 to 5, both inclusive.
6. Order granting interlocutory injunction.
7. Bond of plaintiff.
8. Opinion of the Court.
9. Motion for and consent to the substitution of Harry J. Kirk, as party defendant.
10. Order substituting Harry J. Kirk, as party defendant.
11. Final decree of the Court.
12. Petition for appeal.
13. Assignment of errors.
14. Order of Court allowing appeal and fixing amount of appeal bond.
15. Bonds of defendants.
16. Copy of citation and acknowledgment of service thereof.

[fols. 105 & 106] 17. Præcipe for transcript of record and acknowledgment of service thereof.

18. Stipulation re certification of record.
19. Certification of transcript of record.

Respectfully submitted.

Gilbert Bettman, Attorney General; Joseph A. Godown, Special Counsel, Solicitors for the Appellant Harry J. Kirk, as Superintendent of Public Works and Director of the Department of Highways and Public Works of the State of Ohio. George W. Ritter, Solicitors for the Appellants Roy E. Davis, Ralph E. Farnsworth, and George R. Hoffman, as County Commissioners of Lucas County, Ohio.

Appellee, The Providence Mill Company, through its counsel, hereby acknowledges service of the above Statement of Points and Designation of Necessary Parts of the Record in the above entitled cause, this 11th day of February, 1929, and said appellee, through its said counsel, designates the same parts of the record in said cause for

printing on the appeal as are above designated by appellants.

The Providence Mill Company, Appellee, by U. G. Denman and Karl E. Burr, Its Solicitors and Counsel.

[fols. 107-110] [File endorsement omitted.]

Endorsed on cover: File No. 33,984. Southern Ohio, D. C. U. S. Term No. 675. Harry J. Kirk, as Superintendent of Public Works and Director of the Department of Highways and Public Works of the State of Ohio, etc., et al., appellants, vs. The Providence Mill Company. Filed February 4th, 1929. File No. 33,984.

In United States District Court

[Title omitted]

Order Enlarging the Time for Docketing Case and Filing Record—Filed in Supreme Court April 12, 1929

For good cause shown, the time to docket the above entitled case and file the record thereof with the Clerk of the Supreme Court of the United States is hereby enlarged until and including the 16th day of February, 1929.

Benson W. Hough, District Judge.

[File endorsement omitted.]

IN THE

Supreme Court of the United States

No. 675.

OCTOBER TERM, 1928.

HARRY J. KIRK, AS SUPERINTENDENT OF PUBLIC WORKS AND DIRECTOR OF THE DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS OF THE STATE OF OHIO, SUCCESSOR TO AND SUBSTITUTED FOR GEORGE F. SCHLESINGER, AS SUPERINTENDENT OF PUBLIC WORKS AND DIRECTOR OF THE DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS OF THE STATE OF OHIO, AND ROY C. EVANS, RALPH E. FARNSWORTH AND GEORGE R. HOFFMAN, AS COUNTY COMMISSIONERS OF LUCAS COUNTY, OHIO,

Appellants,

vs.

THE PROVIDENCE MILL COMPANY,

Appellee.

On Appeal from the District Court of the United States, Southern District of Ohio, Eastern Division.

STATEMENT OF CLAIM AS TO JURISDICTION UNDER RULE No. 12 OF THIS COURT.

Appellants appeal to this court from a permanent injunction order enjoining the performance by an officer of

the state of Ohio of duties imposed upon him by certain laws of that state, which injunction was granted by three judges in the District Court of the United States, southern district of Ohio, to appellee, pursuant to a bill in equity filed in said court on April 14, 1928 (Rec., pp. 1-17). The court, consisting of three judges, on April 14, 1928 (Rec., p. 68), granted an application of the appellee for an interlocutory injunction prayed for pending a final hearing of the cause for a permanent injunction. The cause thereafter came on for final hearing on the merits, pursuant to the issue joined by the several answers of appellants before Hon. Maurice H. Donahue, United States circuit judge of the sixth circuit, the Hon. Benson W. Hough, and Hon. Smith Hickenlooper, district judges for the southern district of Ohio (Rec., p. 76).

The Ohio statutes complained of by appellee are Sections 14178 to 14178-12, inclusive, of the General Code of Ohio, as passed May 11, 1927, by the general assembly of Ohio, as found in 112 O. L., pp. 360, 363, entitled:

"An Act

> To abandon a portion of the Miami and Erie canal in Lucas county, Ohio, and to devote the same to highway and other purposes and to repeal all acts in conflict therewith."

Under the terms of the act such portion of the canal was abandoned, all leases of any character thereon were declared void within sixty days after its effective date and the canal property turned over to the superintendent of public works and director of the department of highways and public works of the state of Ohio for highway

and park purposes. The superintendent of public works and director of the department of highways and public works is an officer of the state of Ohio appointed pursuant to Sections 154-1, 154-3, 154-4, 154-40, 404, 411 and 412 of the General Code of Ohio.

The appellee set forth in detail the ownership by it of certain water rights evidenced by agreements and grants in certain leases to it or its predecessors from the state of Ohio, of which it was the assignee, by virtue of which it claimed the right to take water from the Miami and Erie canal and alleged that the superintendent of public works and director of the department of highways and public works of the state of Ohio, pursuant to the provisions of said act of the general assembly, would, unless restrained from so doing, drain the water out of the portion of the canal which is abandoned by the act. (Rec., p. 17.)

On September 7, 1928, said court, constituted as aforesaid, announced its written opinion (Rec., p. 76), finding in favor of the appellee, The Providence Mill Company, permanently enjoining the superintendent of public works and the director of the department of highways and public works, a state officer, from the enforcement of such statutes on the ground that the statutes were unconstitutional.

On December 3, 1928, the three judges of said court entered a final decree (Rec., p. 82), adjudging that said act of the general assembly of Ohio, in so far as it provided for cancellation and termination of the leases from the state of Ohio to appellee, and authorized and directed

the appellant, the superintendent of public works and the director of the department of highways and public works of the state of Ohio, to drain the water from said canal prior to the expiration of the terms of said leases, was a taking of the property of the appellee in violation of the obligation of contracts and due process clauses of the United States Constitution.

On January 3, 1929 (Rec., p. 86), defendants in said District Court (appellants here) filed a petition for appeal to this court, which was duly allowed by the District Court and an order issued accordingly fixing the amount of the appeal bonds (Rec., p. 89). Thereafter the District Court, by several orders, enlarged the time for the docketing of the appeal and the filing of the record thereof with the clerk of this court to February 16, 1929. On February 4, 1929, appellants docketed this cause and filed the record thereof with the clerk of this court.

Upon the statutory jurisdiction of this court to review this cause upon appeal, we call attention to Section 380, United States Code, Title 28, Section 380 (Judicial Code, Section 266, as amended), as follows:

> "No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a state by restraining the action of any officer of such state in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon

the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: **Provided, however,** that one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the state, and to such other persons as may be defendants in the suit: **Provided,** that if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. * * * The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

In reference to the cases appealable to this court under the provisions of Section 266, Judicial Code, as amended, Mr. Justice Brandeis, in the case of In re Buder, 271 U. S., 461 (70 L. Ed., 1036) at page 465, directs attention to the purpose of a paragraph added at the end of Section 266, Judicial Code, by amendment, as follows:

> "The requirement respecting the presence of three judges shall also apply to the final hearing of such suit in the District Court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

and then further adds:

> "As so amended, Section 266 also permits a direct appeal to this court from the final decree in those suits in which the hearing on an application for an interlocutory injunction is required to be before three judges."

In reference to cases reviewable in this court by direct appeal, from the District Court, in the case of Clerk et al. v. Poor, et al., 274 U. S., 54, in the headnote, it is said:

> "The final judgment of the District Court, three judges sitting, which dismisses the bill challenging the constitutionality of a state statute and seeking to enjoin its enforcement, is reviewable in this court upon appeal, under Judicial Code, Section 266, as amended by act of February 13, 1925, when an interlocutory injunction has been applied for and a restraining order issued. (p. 556.)"

From the nature of the case, and it appearing that a state officer has been permanently enjoined from carrying out the provisions of an act of the general assembly of Ohio as repugnant to the provisions of the Constitu-

tion of the United States, we think it is manifest that the final decree, rendered by the court below on the merits, is one from which a direct appeal lies to this court.

Respectfully submitted,

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Attorney General,
L. F. LAYLIN,
JOSEPH A. GODOWN,
Solicitors for Appellants.
LEROY W. HUNT,
Toledo, Ohio,
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IN THE

Supreme Court of the United States

No. 675

October Term, 1928

HARRY J. KIRK, AS SUPERINTENDENT OF PUBLIC WORKS AND DIRECTOR OF THE DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS OF THE STATE OF OHIO, SUCCESSOR TO AND SUBSTITUTED FOR GEORGE F. SCHLESINGER, AS SUPERINTENDENT OF PUBLIC WORKS AND DIRECTOR OF THE DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS OF THE STATE OF OHIO, AND ROY E. DAVIS, RALPH E. FARNSWORTH AND GEORGE R. HOFFMAN, AS COUNTY COMMISSIONERS OF LUCAS COUNTY, OHIO,

Appellants,

vs.

THE PROVIDENCE MILL COMPANY,

Appellee.

On Appeal From the District Court of the United States, Southern District of Ohio, Eastern Division

---

MOTION OF APPELLANTS TO ADVANCE

GILBERT BETTMAN, Columbus, Ohio,
Attorney General of Ohio,
L. F. LAYLIN, Columbus, Ohio,
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Appellants,

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THE PROVIDENCE MILL COMPANY,

Appellee.

MOTION OF APPELLANTS TO ADVANCE

Now come the appellants in the above entitled cause and move that this case be advanced for an early hearing.

In support of their motion appellants make a brief statement of the matter involved and the reasons relied upon for the advancement of the hearing of this cause.

STATEMENT OF MATTER INVOLVED

This cause is here on appeal from a decree of the District Court (three judges sitting) of the United States for the Southern District of Ohio by which appellant Kirk, an officer of the State of Ohio, was enjoined from draining the water from a portion of the Miami and Erie Canal in pursuance of Sections 14178 to 14178-12 inclusive, of the General Code of Ohio, enacted May 11, 1927, 112 Ohio Laws 360-363, on the ground that the performance by him of said duties was the taking of property of the appellee without due process of law in contravention of the Fourteenth Amendment of the Constitution of the United States, and impaired obligations under certain leases and agreements of the State of Ohio leasing to the appellee water used by appellee for hydraulic power and an agreement resulting from the covenants of a deed from the State of Ohio to the City of Toledo conveying to it a part of the Miami and Erie Canal northerly of that part abandoned by the Act of May 11, 1927, in which deed it was agreed that the City of Toledo should compensate appellee for its rights under its leases if the City of Toledo should deprive the appellee thereof, by virtue of the Act of the General Assembly of Ohio, authorizing the execution of said deed enacted January 23d, 1920. Like injunction against other appellants was ordered by the decree of the District Court. The aforesaid Act of the General Assembly of Ohio, of

May 11, 1927, declared that said canal be abandoned, that all leases for canal or hydraulic purpose be null and void sixty days after the passage of the Act, and directed the Director of Highways of the State (appellant Kirk) to drain the water from the abandoned portion of the canal and to prevent the water of the Maumee River from flowing into or through the abandoned part of the canal; by virtue of Sections 2 and 3 of the aforesaid Act the State of Ohio reserved unto itself all title to lands and waters which at the time of the passage of the Act were the property of the State of Ohio occupied by any part of the Miami and Erie Canal, which further provided that the same should forever be held by the State of Ohio in fee simple, and held for the purpose of constructing upon said lands a highway.

Appellants contend that the aforesaid Act of the General Assembly of May 11, 1927, is valid, does not deprive the appellee of its property without due process of law, in violation of the Fourteenth Amendment to the Federal Constitution, and that said Act does not impair the obligations of any agreements of the State of Ohio, in violation of the Constitution of the United States, relying upon the principle: that statutes of the State of Ohio authorizing the execution of said leases provided for certain conditions which for many years have been interpreted to mean that in leasing the surplus waters of the canals of the state there was a reservation of the right to resume the privilege of the use of the water whenever the state deemed it necessary for navigation purposes; that a subsequent statute granting a part of the canal for a public highway amounted to a rescission of the lease; that such steps

did not deprive the lessee of any rights without due process and without just compensation and are not void under the Constitution of the United States; and further that every lessee of power take his lease and put up his improvements with full notice of the reserved right on the part of the state to discontinue its canal and stop his supply of water.

Fox vs. Cincinnati, 104 U. S. 783, affirming
Fox vs. Cincinnati, 33 O. S. 492.
Hubbard vs. Toledo, 21 O. S. 379.
Elevator Co. vs. Cincinnati, 30 O. S. 629.
Voight vs. Railroad Co., 58 O. S. 123.

REASONS RELIED ON FOR ADVANCEMENT

The questions of law applicable to this case are substantially the same as the questions of law in the case of *Kirk et al. vs. Maumee Valley Electric Company*, Number 674 on the docket of this court, which cause and the case at bar can be argued together.

The injunction against Kirk as an officer of the state has the effect of enjoining the state; therefore, in view of the provisions of Section 949 of the Revised Statutes of the United States the appellant, Kirk, is entitled to the advancement of the hearing in this cause. Section 949 provides as follows:

> "When a state is a party, * * * in any suit in a court of the United States, such state * * * shall be entitled, on showing sufficient reason, to have the cause heard any time after it is docketed, in preference to any civil cause pending in such court between private parties."

It is manifest that the State of Ohio is the real party to this cause even though Harry J. Kirk, as superintendent of Public Works and Director of the Department of Highways and Public Works of the State of Ohio, is the appellant, for the State of Ohio is *ex cathedra* through such officer enjoined from carrying out the provisions of the aforesaid Act of the General Assembly. That this is in effect a suit against the state is shown by a recent decision of this court in the case of *State Highway Commission of Wyoming vs. Utah Construction Company*, decided January 2, 1929, and found in the Advance Sheets of the Official Reports of this court including decisions from December 11, 1928, to January 2, 1929, in which the first headnote is:

> "Suit against the State Highway Commission and its members on a road construction contract executed in the name and on behalf of the state, held in effect a suit against the state."

As is readily seen from the foregoing statement, the State of Ohio, if the contention of appellants is correct, is needlessly required to supply water to the abandoned portion of the Miami & Erie Canal, which necessarily works an unwarranted inconvenience and expense, together with a responsibility, upon the State of Ohio.

Brief of appellants is in course of preparation and subject to completion of the printed record it is confidently hoped by counsel that it will be filed before the submission of this motion.

CONCLUSION

According to the information of counsel, if this cause is not advanced the same will not be reached for

argument until October of 1929. We therefore, in conclusion, desire to urge the court to assign this cause for hearing prior to the summer recess of the court.

Respectfully submitted,

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L. F. LAYLIN,
JOSEPH A. GODOWN,
Solicitors for Harry J. Kirk.
LEROY W. HUNT,
Prosecuting Attorney, Lucas County,
Solicitor for Lucas County Commissioners.

IN THE

Supreme Court of the United States

No. 675

October Term, 1928

HARRY J. KIRK ET AL.,

Appellants,

vs.

THE PROVIDENCE MILL COMPANY,

Appellee.

On Appeal from the District Court of the United States, Southern District of Ohio, Eastern Division

BRIEF ON BEHALF OF APPELLANTS

GILBERT BETTMAN, Columbus, Ohio,
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IN THE

Supreme Court of the United States

No. 675

HARRY J. KIRK, AS SUPERINTENDENT OF PUBLIC WORKS AND DIRECTOR OF THE DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS OF THE STATE OF OHIO, SUCCESSOR TO AND SUBSTITUTED FOR GEORGE F. SCHLESINGER, AS SUPERINTENDENT OF PUBLIC WORKS AND DIRECTOR OF THE DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS OF THE STATE OF OHIO, AND ROY E. DAVIS, RALPH E. FARNSWORTH AND GEORGE R. HOFFMAN, AS COUNTY COMMISSIONERS OF LUCAS COUNTY, OHIO,

Appellants,

vs.

THE PROVIDENCE MILL COMPANY,

Appellee.

BRIEF ON BEHALF OF APPELLANTS

STATEMENT OF THE CASE

This cause comes here by direct appeal from a final order and judgment of the District Court of the United States for the Southern District of Ohio, Eastern Divi-

All italics ours unless otherwise noted.

sion, whereby the provisons of Section 14178-14178-12, inclusive, of the General Code of Ohio, insofar as they provide for the draining of the water from a portion of the Miami and Erie Canal extending from Guard Lock No. 9 southwesterly to the point where the canal joins the Maumee River, and insofar as said sections of the General Code declare the lease owned by appellee to be null and void, are repugnant to and in contravention of the Constitution of the United States, and enjoin the appellant Kirk, an officer of the State of Ohio, from performing the duties imposed upon him by the laws of said state. The judgment and order of injunction was granted by three judges sitting in pursuance of the requirements of Section 266 of the Judicial Code, pursuant to which section this appeal was taken.

The Miami and Erie Canal extends from a point where the same enters the Maumee River northeasterly through the Villages of Waterville and Maumee to the City of Toledo. The appellee owns a mill operated by water power, located at Lock 9 (Map, Exhibit 5), which is a short distance northerly from the point where the canal connects with the Maumee River, under a sublease from the Defiance Gas & Electric Company (R. 49).

Prior to September 1, 1842, the state appropriated water rights and lands of Peter Minor. (Rec. 5, par. 7.) In order to settle claims for compensation, on September 1, 1842, the board of public works executed a lease or grant to Minor (Exhibit 1, Rec. 37), which in terms provided for the sale and conveyance to Minor of a sufficient quantity of water, properly applied to propel eight pairs of four and one-half foot millstones, except when otherwise required for the navigation of the canal, or

when breaches occurred, repairs became necessary, or other unavoidable causes prevented; that in consideration therefor Minor agreed to quit claim to the State of Ohio, all right, title and interest against the state for the use and occupation of water from the Maumee River, for the occupation of lands used and appropriated for the construction of the Wabash and Erie Canal, and the occupation of all mill sites of Minor, and the destruction or injury of his mills, dam and mill races, and other property, either real or personal, injured or destroyed in consequence of the destruction of the Wabash and Erie Canal, *excepting only his right to claim and receive damages for destruction of a saw mill which stood upon the ground then occupied by the canal.* Stipulations were contained therein as to the methods of the use by Minor of said lease.

This lease afterwards became the property of the Defiance Gas & Electric Company, who in turn subleased the same for a term ending December 19, 2004, to the appellee (Exhibit 3, Rec. 50).

On May 11, 1927, the legislature of the State of Ohio, over the objection of the governor, enacted Sections 14178-14178-12, inclusive, of the General Code of Ohio, 112 Ohio Laws, 360-363 (Appendix pages 55 to 61), which provide that the Miami and Erie Canal in Lucas County from a point below the head of the Maumee River side-cut southerly to the point where the canal joins the Maumee River on the westerly side thereof be abandoned for canal and hydraulic purposes; that the State of Ohio reserves the title to the canal lands in fee simple; that all existing leases for canal or hydraulic power purposes on the portion of the canal so abandoned became

null and void on and after sixty days from the taking effect of said Act; that the state highway director, within sixty days from the taking effect of the Act, should drain the water from the abandoned portion of the canal and prevent the water of the Maumee River from flowing into or through the abandoned portion thereof; that said abandoned portion of the canal should be under the supervision and control of the state highway director and should be devoted to highway and park uses and purposes; that the director of highways should cause surveys thereof to be made, together with maps and plats thereof; that no portion thereof should be leased for any purpose, but that until the State of Ohio should construct and improve the same for a highway, municipal corporations through which such highway should pass when completed and the commissioners of Lucas County should be permitted to use said canal lands for public purposes only without compensation; the Act also authorized the commissioners of Lucas County, the council or other legislative body of municipalities or townships through which such portion of the canal passed, the right to remove bridges crossing the abandoned portion thereof, and to grade and construct roads and streets across the channel of the abandoned portion thereof by necessary fills or grades, and authorized and directed the county commissioners of Lucas County to authorize the draining of the water from said abandoned portion and to prevent the water from flowing into or through said abandoned portion of the canal; and likewise made provision for leasing lands not necessary for highway purposes. This Act became effective as a law on August 10, 1927, in view of the referendum pro-

visions of Article II, Section 1, of the Constitution of Ohio.

The bill of complaint (Rec. 1) alleges appellee's claim to the right to use hydraulic power by virtue of the sublease and agreements (Exhibits 1-3, inclusive), and further alleges that the director of highways of the State of Ohio is, in pursuance of the Act of May 11, 1927, intending to drain the water from the abandoned portion of the canal, and that the draining of the water from the canal will be a taking of its property without compensation and without due process of law, in violation of the Federal Constitution, especially the Fourteenth Amendment, and also claims that said Act of May 11, 1927, impaired the obligations of the contract between the State of Ohio and Minor. (See bill of complaint, Rec. 1-18.)

The answers (Rec. 18-30, inc.) of appellants in effect denied that the Act of May 11, 1927, would violate the guaranty of the Constitution of the United States.

The evidence is presented by an agreed statement of facts, together with exhibits thereto attached (Rec. 31-63, inc.)

This cause came on for hearing before the Honorable Maurice H. Donahue, United States Circuit Judge of the Sixth Circuit; the Honorable Benson W. Hough, and the Honorable Smith Hickenlooper, United States District Judges for the Southern District of Ohio, in view of Section 266 of the Judicial Code, requiring three judges, one of whom shall be a Circuit Judge, to authorize an injunction to restrain the enforcement, operation or execution of a state statute by restraining the action of an officer of the state. The court held in favor of the

appellee and found (Rec. 70) that the provisions of the Act of May 11, 1927, 112 Ohio Laws 360-362, insofar as it declared or attempted to declare the Minor lease, agreement and grants from the State of Ohio for water to be taken from that portion of the canal described in the Act to be null and void, and insofar as it directed the state highway director to drain the water out of said portion of said canal and to prevent the waters of the Maumee River from flowing into said canal, and granted to appellants permission to fill said canal and obstruct the flow of the water therein, were contrary to and in contravention of the Constitution of the United States, and therefore null and void and of no effect with respect to and as affecting or intending to affect the Minor lease, agreement and grant referred to in the bill of complaint, and enjoined (Rec. 71, 72) the appellant Kirk, as director of highways of the State of Ohio, and each of the other appellants and his or their respective successors, and their various officers, agents, associates, appointees and employees and their respective successors, during the existence of said sublease from draining or causing to be drained from the portion of the canal described in said Act of May 11, 1927, which, except for such draining would be available to appellee for its use, to the amount provided for and called for in said sublease.

HISTORY OF THE MIAMI AND ERIE CANAL

The matter of constructing a canal in Ohio it seems first appears in an inaugural address of Governor Brown, delivered on December 14, 1818, in which he said

in substance that to raise the character of our state by increasing industry and our resources, it was necessary to improve the internal communications, and open a cheaper way to market for the surplus produce of a large portion of our fertile country. ("History of the Ohio Canals," by Kilbourn, page 3.)

On January 7, 1819, a resolution was introduced in the House of Representatives of the State of Ohio, which provided for the appointment of a committee of five members of the house and ..... members of the senate to take into consideration the subject of internal improvements as related to the construction of a canal connecting the waters that flow into Lake Erie with those that flow into the Ohio River. ("History of the Ohio Canals," by Kilbourn, page 3.)

The following day Governor Brown sent a message to the legislative body, in which he said:

> "You will bear in mind, that our productions which form our only great resource, are generally of that bulky and ponderous description, as to need every easement in conveyance, that we can afford. Experience is a faithful monitor; and the millions expended for transportation during the late war, may teach an useful lesson; * * *. Roads and canals are veins and arteries to the body politic, that diffuse supplies, health, vigor and animation to the whole system; * * *." ("History of the Ohio Canals," by Kilbourn, page 3.)

On February 23, 1820, the General Assembly of Ohio enacted a law, in which it recited:

> "Whereas, the effecting a navigable communication, by means of a canal or canals, between Lake Erie and the Ohio River, would greatly promote

> the agricultural, manufacturing and commercial interests of a number of our sister states, of the union generally and of this state particularly." * * *

Therefore, it was enacted that three commissioners be appointed for locating a route for a canal between Lake Erie and the Ohio River, 18 Ohio Laws 147. ("History of the Ohio Canals," by Kilbourn, pages 12 and 13.)

On January 3, 1823, the canal commissioners made their first report. In this report reference is made to the advantage of canal navigation over other modes of transportation. It is said in part:

> "The advantages of canal navigation over any other mode of conveyance, are now so generally known, and so justly estimated that a minute analysis (of) them is not deemed necessary. The fertility of our soil promises to secure to the labors of agriculture an abundance, very far beyond any probable consumption in our own territory.
>
> "The amount of tonnage which this surplus may furnish for the employment of a canal navigation cannot be estimated by the commissioners. * * *
>
> "But the products of agricultural labor will not be the only articles of bulk and value, the transportation of which to distant markets will be opened by a canal navigation. Among various other articles which may be mentioned, the gypsum of Sandusky, and the fisheries of the upper lakes are inexhaustible sources of supply to the interior of the state, and the vast region of the south, of an article of great value to agriculture, and the arts; and an article at present of costly diet, owing to the expense of land transportation from the Atlantic cities.
>
> "The mineral coal of Ohio, is another material at present of value only in its immediate neighborhood; which by a canal navigation would become an important and very valuable article of exportation. * * *

"In estimating the value of our surplus productions, it must not be forgotten that every saving in the expense and labor of transportation to market directly, increases that value and as directly also, increases the value of our lands. * * * That on a canal, one horse will transport as much as will require the labor of 30 horses upon land; * * *." ("History of the Ohio Canals," by Kilbourn, pages 37 and 38.)

Nowhere does this report make any reference to the use of the canal for hydraulic power.

The first suggestion of the use of the canal for water power is found in a report of the canal commissioners under date of January 3, 1825, when for the first time there was a recognition that there was a possibility of utilizing water power. The report shows that in three years from the commencement of the work, an extensive and valuable water power at the southern termination of the canal in Cincinnati would be at the disposal of the state, the amount of water which might be taken from the canal, and the possible income therefrom. ("History of the Ohio Canals," by Kilbourn, page 141.) It will be noticed that in the report reference is made to the water so to be used as "surplus water."

On February 4, 1825, the General Assembly of Ohio, by an Act found in 23 Ohio Laws 50, provided for the appointment of a Board of Canal Commissioners, authorized and empowered the canal commissioners to construct a navigable canal on various routes in the State of Ohio, including the Miami and Erie Canal from Cincinnati to the Maumee River, the expenses thereof to be paid out of the funds of the State of Ohio. These commissioners were authorized to establish reasonable tolls and deputy

marshals for the collection and payment thereof, and to take and use waters and streams of the State of Ohio, but no provision was made therein for the leasing of hydraulic power.

By an Act of Congress passed May 24, 1828, Volume 4, United States Statutes at Large 305, it was provided that lands granted to the State of Ohio be subject to the disposal of the legislature and

> "Provided, That said canal, when completed, shall be, and forever remain, a public highway, for the use of the government of the United States, free from any toll or other charge, whatever, for any property of the United States, or persons in their service, passing through the same: * * *"

It was further provided in said Act that the State of Indiana be authorized to convey and relinquish to the State of Ohio, upon terms to be agreed upon, the right and interest granted to the State of Indiana to lands within the State of Ohio by an Act approved March 2, 1827, which authorized the granting of certain quantities of land for the purpose of aiding the State of Indiana in opening a canal to connect the waters of the Wabash River with those of Lake Erie.

(Surely it could not have been the purpose of the State of Indiana to connect the waters of the Wabash River with those of Lake Erie for the purpose of providing hydraulic power for citizens of the State of Ohio. Thus it is apparent that the purpose of the canal was for navigation, and that the use of water power came up as an incidental purpose.)

The first legislation directly authorizing the board of public works to sell or lease the right to the use of surplus water was enacted on February 18, 1830, 28 Ohio

Laws 58, which was superseded by the Act of March 23, 1840, 38 Ohio Laws, page 87 (Sections 20, 21, 22, 23 are shown in Appendix page . . .). This last Act authorized the board of public works to sell or lease the right to use surplus water for hydraulic or other purposes whenever there should in the opinion of the board of public works be any surplus water. Such right, however, was by said Act, subject to the rights of the state for navigation purposes, and that no water should be used or taken by the lessee or vendee if necessary for the purpose of navigation.

The Act further provided that every such lease, grant or conveyance of *water power* should contain a reservation or condition that the state, or its authorized agents, might resume the right or privilege to the use of the water, or any portion thereof, whenever it was deemed necessary for the purposes of navigation or whenever its use for hydraulic purposes should be found to interfere with and injuriously affect navigation, and whenever such privileges should be resumed in whole or in part, the sum paid therefor or rent reserved or the reasonable portion thereof should be determined upon agreeably to the stipulations or agreements of the deed of conveyance and be refunded or remitted to the purchaser or lessee.

This Act continued in effect until amended by the Act of March 21, 1917, 107 Ohio Laws 418, Section 14009, Volume 3 of Page's Annotated Ohio General Code (Appendix pp. 54, 55). The amendment to the Constitution of Ohio had transferred to the superintendent of public works the duty formerly imposed upon the board of public works. The amendment of March 21, 1917, carried

this into effect and reduced the term of the water leases to twenty-five years.

In the case of *State ex rel. vs. Railway Company*, 37 O. S. 157, it was held that the object of the state in constructing the canal was to effect a navigable communication between Lake Erie and the Ohio River in order to promote the agricultural, manufacturing and commercial interest of a number of our sister states of the Union generally and of this state particularly, in effect the language of the law enacted by the General Assembly on February 23, 1820.

Fox vs. Cincinnati, 104 U. S. 783; 33 O. S. 492.

Walsh vs. Railroad Company, 176 U. S. 469, 477; 58 O. S. 123.

SUMMARY OF ARGUMENT

Appellants contend:

I. That the governmental and principal purposes for the establishment of the canal were for transportation; that the use of surplus water for hydraulic power by various lessees of the State of Ohio was an incidental purpose and therefore the State of Ohio had a right to terminate the use of the canal for navigation purposes at such time as it chose, and upon its determination to abandon the canal for navigation purposes the rights of lessees to use the surplus water of the canal for hydraulic purposes, being incidental to the main purpose, thereby ceased, without liability for compensation to such lessees on account of any loss resulting therefrom.

II. The state, having prior to September 1, 1842, occupied the property of Minor, including his mill race,

for the purposes of the canal, pursuant to the authority of Section 8 of the Act of February 4, 1825 (23 O. L. 550), became the owner in fee simple of the lands and mill race of Minor so possessed and occupied; that on September 1, 1842, Minor was not possessed of the lands and mill race which had theretofore been appropriated by the state, and therefore he did not and could not convey to the state the lands nor the mill race by virtue of the agreement of September 1, 1842 (Exhibit 1), Rec. 37); that the grant from the state of water rights by the agreement of September 1, 1842 (Exhibit 1), must necessarily have been limited to such rights as the board of public works was authorized to grant within the limitations of Sections 20, 21, 22, and 23 of the Act of 1840.

III. That the Act of 1840, Section 38 Ohio Laws 87, Swan's Statutes of Ohio, 1841, pages 174-200, pursuant to which leases of the appellee were executed, correctly interpreted, give the state the right to abandon any portion of the canal at any time, and thereby terminate all rights under leases for hydraulic power, subject only to the right of such lessees to receive back from the state such proportion of the rentals which the lessees may have paid in advance as the unexpired part of the term of the lease bears to the rent paid.

IV. That the legislature of the State of Ohio had a right to abandon the canal for navigation purposes, and, having abandoned the canal for navigation purposes, could require that the water from the Maumee River follow its natural course, and that the failure of the officers of the state to return the water to the natural course of the Maumee River, depriving the state and those having rights detrimentally affected by the failure of the water

to flow freely and uninterruptedly in its natural course, is unlawful.

V. Appellee's lease was executed after the Supreme Court of the State of Ohio, as well as the Supreme Court of the United States had determined that in view of the provisions of the Act of 1840, 38 Ohio Laws 87, the use of the water for hydraulic purposes was but an incident to the principal object for which the canal was built; that when the canal was no longer needed for its principal object, namely, navigation, the state had a right to abandon the same without creating any liability to continue to supply water for hydraulic purposes, and that every lessee of hydraulic power took his lease and made his improvements with full knowledge of the reserved right of the state to discontinue the canal and to stop the supply of water, and therefore the appellee took whatever rights were granted to it by the lease subject to the construction of the terms and conditions thereof as pronounced by the Supreme Court of Ohio and the Supreme Court of the United States. That changes in the circumstances because of the change in and development of methods of transportation, and changes in the economic conditions of the country would not and cannot enlarge the subject matter of Minor's grant, so as to extend to appellee rights which are greater than those granted at the time of the original grant. That no expansion or extension of such rights can be made by a change of circumstances, but that action on the part of the state by executing an additional lease or grant authorized by proper legislative authority would be required in order to convey rights enlarging those originally granted.

VI. That the legislature of the State of Ohio has the power to declare the public policy of the state and as such has the power from time to time to change the public policy of the state, and that no legislature can forever settle such public policy, nor foreclose a subsequent legislature from changing such public policy.

VII. To give effect to the claim of appellee would result in requiring the State of Ohio to devote public property to private use. This would be in violation on the part of the state of its duties to the public.

VIII. That the State of Ohio did not and could not abandon the canal for navigation purposes by lack of use, but that such abandonment was only by act of the legislature expressly so declaring; that no such abandonment of the canal was effective as to Lineal Part Two until the Act of May 11, 1927, 112 Ohio Laws 360-363.

IX. That the District Court erred in holding that the Supreme Court of Ohio in the case of *State ex rel. vs. Middletown Hydraulic Company*, 114 O. S. 437, changed the rule established by its earlier decisions in the case of *Hubbard vs. Toledo*, 21 O. S. 379, and other kindred cases.

SPECIFICATION OF ERRORS

1. The District Court erred in decreeing that the Act of the General Assembly of Ohio passed on May 11, 1927, 112 Ohio Laws, 360-363, Sections 14178-14178-12, inclusive, of the General Code of Ohio, to be in contravention of and contrary to the Constitution of the United States so as to deprive the appellee of rights without due process of law, and in decreeing that said Section impairs the obligation of agreement and lease between Peter

Minor and the State of Ohio, and thus terminating rights of appellee under its sublease.

2. The decree of the District Court is contrary to the decisions of the Supreme Court of Ohio and of this court.

ARGUMENT

I

The principal object for which the canal was built was navigation. The use of water for hydraulic power was an incidental purpose. When the canal is no longer needed for its principal object, namely, navigation, it may be abandoned without creating any liability on the part of the state to continue to supply water for hydraulic purposes. Every lessee of hydraulic power took his lease and made his improvements will full knowledge of the reserved right of the state to discontinue the canal and to stop the supply of water without compensation for any loss which any lessee might thereby sustain.

Fox vs. Cincinnati, 104 U. S. 783. Affirming Fox vs. Cincinnati, 33 O. S. 492.

Hubbard vs. Toledo, 21 O. S. 379.

Elevator Company vs. Cincinnati, 30 O. S. 629.

State vs. Board of Public Works, 42 O. S. 607.

Voight vs. Railroad Company, 58 O. S. 123. Affirmed under name of Walsh vs. Railroad Company, 176 U. S. 469.

The question thus presented first arose in the case of *Hubbard vs. Toledo, supra,* in which the Honorable Morrison R. Waite, afterwards Chief Justice of the United States, was one of the attorneys for the plaintiff, Hubbard, the owner of a lease from the State of Ohio of hydraulic power located on the Miami and Erie Canal in the City of Toledo. That portion of the canal was abandoned without making any provision for compensating Hubbard on account of the use of water prior to the expiration of the term of his lease. The Supreme Court of Ohio held that the leases or agreements for the use of hydraulic power, in view of the terms and conditions of the Act of March 23, 1840, under which the same were authorized, must be interpreted to give to the state the right to abandon the canal for navigation purposes at such times as it might deem proper, withdraw the water from the canal, destroy the rights of the holders of water leases without liability for compensation to such holders; that the governmental power of the state authorizes the taking of water from natural water courses and diverting them to a canal for the purpose of navigation; that the purpose of the construction of the canal was to create a system of transportation by water, and that the leasing of water rights was simply incidental to the main purpose. We quote from the syllabus of the Supreme Court of Ohio in that case:

> "2. The obstruction of a navigable stream cannot be maintained to promote private interests. Hence, when the state abandoned the Manhattan Branch Canal the aqueduct, a part thereof, spanning and obstructing Swan Creek, which is a navigable stream, became a common nuisance, to abate which any riparian proprietor injured thereby had the legal right to invoke judicial proceedings.
>
> * * *

"4. The abandonment of her public canals by the state, creates no liability on her part to respond in damages resulting therefrom to parties holding leases of 'surplus water,' under the Act of March 23, 1840, 'to provide for the protection of the canals of the State of Ohio, the regulation of the navigation thereof, and the collection of tolls'."

This question was again before the Supreme Court of Ohio in the case of *Elevator Company vs. Cincinnati, supra*. Afterwards litigation arose between Fox and the City of Cincinnati, in which the Supreme Court of Ohio for the third time affirmed the principles hereinbefore referred to. The case proceeded by writ of error to this court and Chief Justice Waite for this court rendered the opinion affirming the decision of the Supreme Court of Ohio, citing with approval the case of *Hubbard vs. Toledo, supra*, and *Elevator Company vs. Cincinnati, supra*; on page 785 it is said:

"* * * and it never could have been intended in this way to impose on the state an obligation to keep up the canal, no matter what the cost, for the sole purpose of meeting the requirements of its water leases. There was certainly no duty resting on the state to maintain the canal for navigation any longer than the public necessities seem to require. When it was no longer needed, it might be abandoned; and, if abandoned, the water might be withdrawn altogether. Provision was made for resuming the water and stopping the supply, if the canal was kept up for navigation; but no such provision was necessary in respect to the abandonment of the whole work, because the right to abandon followed necessarily from the right to build. If the water was resumed while navigation was maintained, no matter how injuriously it affected lessees, all that could be

> asked of the state was to forego the further collection of rents, or refund a reasonable proportion of such as had been paid in advance. The entire abandonment of the canal could not create any different liability. Every lessee of power took his lease and put up his improvements with full notice of the reserved right of the state to discontinue its canal and stop his supply of water."

As to the opinion of this court in *Fox vs. Cincinnati, supra*, and as to the case of *Elevator Co. vs. Cincinnati, supra*, this court in the case of *Kaukauna Co. vs. Green Bay, etc., Canal*, 142 U. S. 255, opinion by Mr. Justice Brown, said:

> "In the *Little Miami Elevator Company vs. Cincinnati*, 30 O. S. 629, the right to lease surplus water for private use was recognized as an incident to the public use of a canal for the purpose of navigation; but it was held that such use was a subordinate one, and that the right to the same might be terminated whenever the state, in the exercise of its discretion, abandoned or relinquished the public use. * * * 'By so doing,' said the court, 'the water power would cease to be an incident to the public use, and the state would be engaged in the private enterprise of keeping up and renting water power after it ceased to act as a government in keeping up the public use.' The same ruling was made by this court in *Fox vs. Cincinnati*, 104 U. S. 783."

Hubbard vs. City of Toledo, supra, was also cited.

Courts in other states considering abandonment of canals have likewise held that a canal is a public work constructed for a public purpose and that the leasing of water power is simply an incident to the canal and not

the purpose of its creation; that a lessee of water power must have known the purpose for which the canal was constructed and took such leases subject to the use of the canal and of all the vicissitudes which might attend a public work of such character, namely, dilapidation, destruction or abandonment; such lessee had no legal right to suppose that the state would keep up the canal for the purpose of furnishing him water if it became inexpedient to maintain it as a public work.

Fishback vs. Woodruff, 51 Ind. 102.
Trustees vs. Brett, 25 Ind. 409.
Skellen vs. Water Works, 49 Ind. 193.
Hoagland vs. Railway Co., 111 Ind. 443; on rehearing 111 Ind. 451.
Commonwealth vs. Railroad Co., 51 Pa. State 351.
Jessup vs. Loucks, 55 Pa. State 350.

II

The bill of complaint (Rec. 5, par. 7) alleges that in 1837 the state constructed the canal on Minor's land, used and occupied his mill race throughout the length thereof, tore down and destroyed his mill, and constructed a dam across the Maumee River, thereby destroying Minor's water power. This must have been prior to September 1, 1842, for in the agreement of Minor of that date (Exhibit 1) it is recited that certain buildings of Minor stood on the ground "now occupied by said canal." Exhibit 1 further recites that the grant by the state was for the use and occupation of water from the Maumee River, for the occupation of all lands

used and appropriated in the construction of the Wabash and Erie Canal and its appurtenances, for the occupation of all mill sites of Minor, and for the destruction or injury of and to all mills, dams and mill races and other property damaged, injured or destroyed in consequence of the construction of said canal (Rec. 38). The facts therefore show an appropriation by the board of canal commissioners in pursuance of Section 8 of the Act of February 4, 1825. Such appropriation vested in the state the fee simple title to the lands, mill races and other property so occupied by the state.

Malone vs. Toledo, 34 O. S. 541.

State ex rel. vs. Railway Company, 53 O. S. 189.

Therefore, on September 1, 1842, Minor did not convey to the State of Ohio any of the property as now claimed by appellee, for the state had theretofore by appropriation acquired title thereto. Minor's rights were claims to damages. He claimed compensation and the agreement (Exhibit 1) was executed for the purpose of compensating him for the property so taken. It was not intended thereby to compensate him for his damages resulting from the destruction of his saw mill which stood upon the ground which the state had occupied, but he excepted his right to claim and receive damages on account of such destruction.

The authority of the canal commissioners to grant water rights to Minor is found in and was limited by Sections 20, 21, 22, and 23 of the Act of March 23, 1840. Any grant by the canal commissioners must necessarily be construed in the light of their limited authority. The

claim that there were any rights granted to appellee by the Act of March 3, 1831, cannot be sustained because the commissioners were thereby authorized at their option to convey to the *owner or owners* of any mill site *so liable to be injured* on account of the introduction of such additional water, a part of the water power to be so created as compensation for damages sustained by the taking of such additional quantity of water from such stream. To determine the owner or owners of mill sites so liable to be injured is by an examination of a prior sentence of the Act, which provided that where the introduction of a greater quantity of water than was required for navigation, thereby creating available hydraulic power, or where the introduction of such additional quantity of water would injure mills or mill sites on streams, the commissioners were authorized to purchase such mills or mill sites or rights, or the right to take such additional quantity of water, on condition, however, that the sum to be paid should not exceed two-thirds of the sum which the commissioners should ascertain the hydraulic privileges could be sold for. There is nothing in the record which suggests that the conveyance to Minor was on account of the authority so granted. Minor on September 1, 1842, was not the owner of the mill site. The state was not at the time introducing a quantity of water which would injure his mill or mill site. It had theretofore taken possession of and occupied the property, so that Minor at the time was not "liable to be injured"; his property had been effectively taken by the state. His injury or damage had theretofore occurred.

III

The Act of March 23, 1840, 38 Ohio Laws 87, until amended by the Act of March 21, 1917, provided the only authority under which the Minor grant was executed. Said grant was necessarily made subject to the terms and provisions of said Act which provided in substance that every lease, grant or conveyance of water power should contain a reservation or condition that the state or its authorized agents might resume the privilege to the use of the water or any portion thereof whenever it is deemed necessary for the purposes of navigation or whenever its use for hydraulic purposes shall be found in any manner to interfere with and injuriously affect navigation and *whenever such privilege* (to the use of water) *shall be resumed in whole or in part*, the sum paid therefor or rent reserved or reasonable portion thereof should be determined upon agreeably to stipulations in the deed of conveyance and be refunded or remitted to the purchaser or lessee.

The leases under consideration in the case of *Hubbard vs. Toledo, supra*, and the other cases decided by the Supreme Court of Ohio, and also in the case of *Fox vs. Cincinnati, supra*, decided by this court, were executed pursuant to the authority of the Act of March 23, 1840. These decisions hold that by the terms of the lease and of the statute authorizing it, the state assumed no responsibility to maintain the canals for the exclusive benefit of lessees of surplus water, and that said contracts of leases contained no express stipulation for the payment of loss to lessee in the event of abandonment of the canal; that the agreement of lease would not impress upon the state a liability by implication on account of

abandonment, where no liability against the state was created on account of a resumption of water by the state within the purposes of the Act of March 23, 1840.

Upon this subject Mr. Chief Justice Waite, in the case of *Fox vs. Cincinnati, supra,* said:

> "Provision was made for resuming the water and stopping the supply, if the canal was kept up for navigation; but no such provision was necessary in respect to the abandonment of the whole work, because the right to abandon followed necessarily from the right to build. If the water was resumed while navigation was maintained, no matter how injuriously it affected lessees, all that could be asked of the state was to forego the further collection of rents, or refund a reasonable proportion of such as had been paid in advance. The entire abandonment of the canal could not create any different liability."

This grant to Minor was made during the period when the provisions of the Act of March 23, 1840, were without change in effect. If the Act of March 23, 1840, and the leases executed in pursuance thereof, at the time of the decision of the case of *Fox vs. Cincinnati, supra,* and of the decisions by the Supreme Court of Ohio of the cases of *Hubbard vs. Toledo, Elevator Co. vs. Cincinnati* and *Voight vs. Railroad Co.* were subject to the interpretation as applied by these courts, there having been no amendment to the law, it would seem to follow that the leases and agreements subsequently made under the same authority, with the same terms and provisions, must of necessity have the same meaning.

Warburton vs. White, 176 U. S. 484.
Banks vs. DeWitt, 42 O. S. 263.
Kulp vs. Fleming, 65 O. S. 321.

IV

The state takes water for the canal from the Maumee River at the southerly point of "Lineal Part Two" and carries the same northerly, thus diverting water which would, if uninterrupted, naturally flow in the channel of the Maumee River. Of course, the state had the right to divert the water from its normal flow through the channels of the Maumee River for navigation purposes. But upon abandonment of such purposes in accordance with the Act adopted May 11, 1927, the public purposes for which the state had been taking the water ceased. The rights of the appellee being solely on account of the use of water for hydraulic purposes and being a purpose incidental to the governmental purpose of navigation, the appellants who are adversely affected by the flow of the water through the canal instead of the natural channel of the Maumee River are entitled to have the water of the Maumee River restored to its natural flow.

Cooper vs. Williams, 5 Ohio 391.

Buckingham vs. Smith, 10 Ohio 288-296 and 7.

Sweet vs. Syracuse, 129 N. Y. 316-335.

Kaukauna Co. vs. Green Bay, etc., Canal, *supra*.

Appellee is therefore without equity and not entitled to the relief prayed for.

V AND VI

The lease to appellee was executed in 1922 after the Supreme Court of the State of Ohio and this court construed the Act of March 23, 1840, to entitle the state to the right at any time to decide so to abandon the canal for navigation purposes without liability to any lessee on account of such abandonment and that such lessee took his lease and made his improvements with full knowledge of the rights reserved by the state to so abandon the canal without liability on account of the terms of the leases for hydraulic power. The *Voight* case involved a grant by the state similar to the one to Minor. The appellee having knowledge of the construction and interpretation by this court and of the Supreme Court of Ohio of said Act of the legislature, cannot now complain that the abandonment by the state of the canal deprives it of any rights to which it is entitled. The question thus presented is clearly *stare decisis*.

Robb vs. Irwin, 15 Oh. 689, 703, 704.
Arrowsmith, vs. Harmoning, 42 O. S. 254.
Cincinnati vs. Taft, 63 O. S. 141, 161, 162.
Warburton vs. White, *supra*.

The appellee cannot rely upon the provisions of Section 14218 of the General Code, enacted April 9, 1902, 95 Ohio Laws 118, by which the legislature declared as a settled policy of the state that the Miami and Erie Canal, together with its water supplies, reservoirs, dams, feeders and adjacent land from Cincinnati to Toledo, should be retained and maintained as a public canal. Like declaration of policy was made as to the northern division of the Ohio Canal from Cleveland to Dresden on

the Muskingum River. The second section anticipates change of public policy of the state as to the canals by providing that if the policy of the state should change so as to abandon the canal, the state should pay to persons thereafter building boats for use on the canal the value thereof. We desire to emphasize the importance of this provision as showing the intent of the state as to the probability of changing its public policy, and likewise to emphasize the failure of the legislature to make any provision for compensation to the holders of water leases on account of loss sustained by reason of improvements subsequently made by them, in the event of the abandonment of the canal.

The public policy of the state is a variable thing. It fluctuates with circumstances of time. Public policy of the state is determined by its legislature and its courts, and whenever the interest of the public requires a change in public policy on account of varying conditions and circumstances the public policy must of necessity be changed, regardless of a declaration to the contrary by a previous legislature or by previous decisions of courts.

As said in Williston on Contracts, Vol. 3, Section 1630:

> "The truth of the matter seems to be that public policy is a variable thing. It must fluctuate with circumstances of the time."

See also *Nordenfelt vs. Maxim Guns and Ammunition Co.*, 1894, A. C. 535; *Attorney General vs. Adelid Steamship Co.*, (1913) A. C. 781; *Horner vs. Graves*, 7 Bingham 735.

In the case of *Seattle Electric Co. vs. Power Company*, 40 Washington 380, it is said:

> "While courts of equity will not enforce contracts entered into either in violation of positive law or a rule of public policy where the public interests of the parties thereto are alone involved, yet, when *the public interests* are involved, it will enforce such contracts as long *as such public interest requires it.*"

The legislature of the State of Ohio has consistently since 1902 and whenever the circumstances seemed to have arisen, by abandoning portions of the canal, altered the policy declared by the Act of April 9, 1902. For various acts of the legislature of Ohio, enacted since April, 1902, abandoning portions of the canal, see:

102 Ohio Laws 168 (Section 14188-1 *et seq.*, Ohio General Code) permitting the City of Cincinnati to use a portion of the canal for public streets, boulevards, sewerage, conduits and subway purposes.

103 Ohio Laws 720 (Section 14188-6 (a) *et seq.*, Ohio General Code) grants similar rights to the City of Cincinnati.

106 Ohio Laws 293 (Section 14188-6 (h), Ohio General Code) grants similar rights to the City of Cincinnati.

106 Ohio Laws 499 (Section 14176-1 *et seq.*, Ohio General Code) authorizing the sale to the City of Toledo of the portion of the canal northeasterly from that portion of the canal shown in Stipulation Exhibit No. 25, and northeasterly from the portions sold by the state to the city hereinafter referred to.

107 Ohio Laws 572 (Section 14188-9, Ohio General Code) authorizing quit-claim deed to the City of Toledo.

108 Ohio Laws, Part 2, pages 1138 (Section 14188-15 *et seq.*, Ohio General Code, pursuant to which a deed from the State of Ohio to the City of Toledo (Stipulation Exhibit No. 15) was executed by the governor and delivered to the City of Toledo.

109 Ohio Laws 369, authorizing the sale of certain canal lands within the City of Toledo.

The Act of May 11, 1927, in terms repealed any Act inconsistent therewith, and therefore, insofar as Section 14218 of the General Code conflicts with the Act of May 11, 1927, the same is repealed; (Section 13 provides that all Acts or parts of Acts in conflict "with this Act be and the same are hereby repealed").

The appellee acquired its sublease in 1922 after the legislature had repeatedly shown an inclination to abandon portions of the canal and change its public policy. Therefore the appellee in no event is entitled to any consideration in equity on account of change by the General Assembly of any public policy declared by the Act of April 9, 1902, even though the law would permit a recovery on account of such change of public policy. These Acts do not show a change by the state of its right to maintain the canal for transportation purpose and constitute itself a proprietor selling water power.

Changed circumstances cannot enlarge the grant in the Minor lease.

In *Hoagland vs. Railway Co.*, on rehearing 111 Ind. 451, the opinion of the court, after stating that the rights of the appellant were pursuant to a lease which did not convey any other rights than those to the use of surplus

water not required for navigation purposes, said with reference to the argument of counsel as to changed circumstances requiring a different construction of the lease:

> "The changed circumstances of which counsel so often speak did not enlarge the subject of the demise. The grantees of the state are not in a different position than that of their grantor so far as respects the subject of the lease. That was not expanded by anything done by them or anyone else."

In the case of *Douglass vs. Pike County*, 101 U. S. 677, this court in considering the law of Missouri in relation to certain bonds, said, at page 687:

> "So far as this case is concerned, we have no hesitation in saying that the rights of the parties are to be determined according to the law as it was judicially construed to be when the bonds in question were put on the market as commercial paper. We recognize fully, not only the right of a state court, but its duty to change its decisions whenever, in its judgment, the necessity arises. It may do this for new reasons, or because of a change of opinion in respect to old ones; and ordinarily we will follow them, except so far as they affect rights vested before the change was made."

In relation to applying new decisions, this court said:

> "* * * but we cannot give them a retroactive effect without impairing the obligation of contracts long before entered into. This we feel ourselves prohibited by the Constitution of the United States from doing."

Mr. Justice Hughes in the case of *Virginia vs. West Virginia*, 238 U. S. 202, at page 236 said:

"The lapse of time has not changed the substance of the agreement. It is not necessary to review the history of the intervening years or to pass upon the contentions of the parties with respect to responsibility for delay. The contract is still to be interpreted according to its true intent, although altered conditions may have varied the form of fulfilment."

In *Walker Realty Company vs. American Surety Company*, 60 Utah, 435, in the opinion by Thurman, J., on page 452, it is said:

"The court also indorses as correct the proposition advanced by defendant to the effect that, in order to arrive at the intent of the parties to a contract, we must consider its terms in the light of conditions as they existed at the time the contract was entered into and not in the light of subsequent conditions, which perhaps were not within the contemplation of the parties when they executed the contract. We believe this rule is likewise elementary except in cases where public interests are involved, in which case the parties are presumed to contract in contemplation of the power of the state to modify or abrogate the contract entirely, if necessary for the public welfare by reason of changed conditions."

Beckwith vs. Howard, 6 R. L. 1, 11.

Hubbard vs. Toledo, *supra*, 401.

VII

The furnishing of hydraulic power to a private corporation such as appellee, is a private as distinguished from a governmental function.

Kaukauna Water Power Co. vs. Canal Co., *supra*.

Buckingham vs. Smith, *supra*.

Varick vs. Smith, 5 Paige (N. Y.) 137.

The state in creating the canals and in taking property for that purpose assumed to do so for a governmental or a public purpose, namely, for the purposes of navigation. For the state now to be compelled to devote these canals for the primary purpose of furnishing hydraulic power would be in effect devoting the lands taken by it for a public purpose to a private purpose, thus violating a duty owing by it to the public.

Kaukauna Water Power Co. vs. Canal Co., *supra*.

Illinois Central R. Co. vs. Illinois, 146 U. S. 387.

Rossmiller vs. State, 114 Wis. 169.

Bradshaw vs. Mill Co., 52 Minn. 59.

In the case of *Buckingham vs. Smith, supra*, the Ohio Supreme Court, with reference thereto, said:

> "We know of no instances in which it has, or can be taken, even by state authority, for the mere purpose of raising a revenue by resale, or otherwise; and the exercise of such a power would be utterly destructive of individual right, and break down all the distinctions between *meum et tuum*, and annihilate them forever, at the pleasure of the state."

The state should not be required to maintain canals at a sacrifice for the exclusive benefit of the lessees of water.

State ex rel. vs. Board of Public Works, *supra*.

The question here for consideration is the vested right of the appellee. If buildings have been constructed and expenditures have been made by the appellee which might naturally lead, between private individuals, to a consideration in favor of preserving the water privileges for the appellee to prevent its loss, the courts will not use discretionary power to give relief for loss which will result to the appellee as the result of the Acts of the legislature in abandoning the canal. The appellee, if it desired to have saved itself from the resulting loss, should have considered the broad powers of the state as shown by the decisions of the courts in interpreting the statutes of Ohio authorizing the lease which has granted to the appellee the rights which it has in the past been enjoying.

VIII

Appellee in effect claims that at the time of the making of its lease, the canal, by reason of non-use, had been abandoned and thereby all of the water in the canal became surplus water. It will be observed that the bill of complaint (Rec. 4) alleges and the answers (Rec. 19, 26) admit that there has been no commercial navigation on the canal for thirty years. Such non-user, however, is distinguished from abandonment; non-user does not create abandonment.

Adams vs. Hodgkins, 109 Me. 361.

Abandonment is a matter of both intention and act; non-user is not of itself abandonment. Whether the act of a party constitutes abandonment depends on intent.

Absence from and non-user of property do not prove an intention to abandon, although conduct of that kind may continue unexplained for such length of time as not to be consistent with any other hypothesis.

Farmers' Irr. Dist. vs. Frank, 72 Neb. 136.

In order to constitute an abandonment of a water right there must be an intent to abandon coupled with some act of relinquishment by which the intent is carried out.

Ranch Co. vs. Argile, 28 Utah 398.

In the opinion of the court below in the *Maumee Valley Electric* case, it is said that the state was engaged as a principal business in the contracting of water power for the manufacture of power and energy as a commercial proprietor. When there was a change of the principal object of the canal, namely, for navigation, to that of furnishing water power, is not made apparent from the evidence in the case nor from any legislative Acts of the General Assembly. We deny the power to make any such change except by express legislative declaration. We assert that any attempt to so declare a change of object would be void as it is beyond the power of the state to take private property for a private purpose.

The board of public works in the making of the leases could not bind the state in its proprietary capacity; the authority of the board of public works to execute the lease was shown by and limited to the provisions of the Act of March 23, 1840, 38 O. L. 87, with slight amendment, immaterial here, by Sec. 14009, Ohio General Code.

IX

The rights under the Minor grant do not differ from the other leases in respect to the right of the state to terminate the same by the abandonment of the canal.

By Section 8 of the Act of the legislature of Ohio, passed February 4, 1825, 23 Ohio Laws 50, the canal commissioners were authorized "to enter upon and take possession of and use all and singular any lands, waters, streams and materials necessary for the prosecution of the improvements intended by this Act."

The Act further provided:

> "* * * that in case any lands, waters, streams or materials, taken and appropriated for any of the purposes aforesaid, shall not be given or granted to this state, it shall be the duty of the canal commissioners, on application being made to them by the owner or owners of any such lands, waters, streams or materials, to appoint by writing not less than three nor more than five discreet, disinterested persons as appraisers * * *, and it shall be the duty of said appraisers, or a majority of them, to make a just and equitable estimate and appraisal of the loss or damage, if any, over and above the benefit and advantage to the respective owners and proprietors, or parties interested in the premises * * *, and the canal commissioners shall pay the damages so to be assessed and appraised, and the fee simple of the premises so appropriated shall be vested in this state."

Pursuant to the authority thus granted, the canal commissioners, in the construction of the canal, proceeded in some cases by negotiating with the owners of property and riparian rights and in other cases by ap-

propriating the property or rights and afterwards settling the claims of the owners thereof in the manner provided by the legislature above set out. The effect of this legislation was outlined by the Supreme Court of Ohio in the case of *Ohio ex rel. vs. Railway Company*, 53 O. S. 189, which holds that the mere occupation of the land by the state was a seizure and appropriation thereof, and that the state thereby took the title to the lands, leaving to the former owners simply a claim for compensation.

The Minor grant (Exhibit 1, Rec. 37) is an agreement between the State of Ohio and Minor, executed about September 1, 1842, in which the commissioners of public works sold and conveyed to Minor a sufficient quantity of water, properly applied, to propel eight pairs of four and one-half foot millstones, except when otherwise required for the navigation of the canal, or when breaches occurred, repairs became necessary, or other unavoidable causes prevented; that in consideration therefor Minor agreed to convey and quit claim to the State of Ohio that which the state had theretofore acquired by appropriation resulting from its occupancy, namely, the mill race, for the use and occupation of water from the Maumee River, for the occupation of lands used and appropriated for the construction of the Wabash and Erie Canal, and the occupation of all mill sites of Minor, and the destruction or injury to his mills, dam and mill races, and other property, either real or personal, injured or destroyed in consequence of the destruction of the Wabash and Erie Canal, excepting only his right to claim and receive damages for destruction of a saw mill which stood upon the ground then occu-

pied by the canal. Stipulations were contained therein as to the methods of the use by Minor of said lease.

It is apparent that the state had theretofore constructed the Wabash and Erie Canal (afterwards called the Miami and Erie Canal) in 1837 (bill of complaint, Rec. 3), at least it was prior to 1839 (Rec. 47), on Minor's land, and thereby, under the ruling decisions in the case of *Malone vs. Toledo, supra,* and the case of *Ohio ex rel. vs. Railway Company, supra,* appropriated his lands. Thereafter, in order to compensate Minor for such appropriation, the above mentioned grant was executed by the state within the power granted the State of Ohio pursuant to the Act of March 23, 1840. Thereafter Minor made claim for damages done to his mill, which was settled by the state (Rec. 47).

It is clear that the grant which the board was authorized to make to Minor was no different from any other grant which the board might make to anyone. Such leases might have been either for a term of years or in perpetuity, except that under the circumstances in the Minor case there was no annual rent provided for. This lease was not forced upon Minor, but was taken by him voluntarily as part of the consideration for his riparian rights. It gives to him no greater right than that acquired by any other lessee of the state. Whatever right remained in the state to terminate leases by the abandonment of the canal was as inherently a part of the Minor grant as of any other lease made by the state.

The appellee contended below that the agreement between the State of Ohio and Minor was similar in effect to the agreement which was before the Supreme Court of the State of Ohio in the case of *State ex rel. vs.*

Middletown Hydraulic Company, 114 O. S. 437, and also that the Supreme Court of Ohio by the last cited case changed the rule as expressed in the case of *Hubbard vs. Toledo* and other similar cases above cited, as to the relative rights and duties of the state in relation to the termination of leases for surplus wtaer by abandonment of the canal. We contend that the Minor agreement is distinguished from the one considered by the Supreme Court of Ohio in the *Middletown* case in that the Minor transaction was neither an exception nor reservation, but merely a stipulation as to the consideration to be paid to Minor. We call the court's attention to the case of *York Haven Water & Power Company vs. York Haven Paper Company*, decided by the Circuit Court of Appeals, 3rd Circuit, 201 Fed. 270. In this case the court, in referring to an attempted reservation similar to the one involved here, said at page 276:

> "It was with reference to this artificial water power thereafter to be created that the reservation and its auxiliary covenants were made. Clearly this was the creation of a right or interest which had no prior existence as such in the property conveyed. It was a new right or interest and was reserved as a rent or an easement might have been reserved. It was something that was created by and grew out of the transaction. The distinction is well illustrated in this very deed where the grantor 'excepts' a certain lot or parcel of land described by metes and bounds from the grant of the whole tract. The thing excepted was *in esse*, as is the coal or other minerals which are excepted from the grant of the land which they underlie, or the standing timber excepted from the land on which it grows. • • •
>
> We think, therefore, that no right of or title to property was retained by the Paper Company by

> the reservation contained in its deed to the Power Company. * * * The very existence, as well as the value of the interest reserved, rested in the obligation of the Power Company to construct the works and deliver and supply the water it had stored to the headgates of the Paper Company."

The language of the so-called reservation involved in that case was as follows:

> "Reserving also to the said York Haven Paper Company, its successors and assigns, a sufficient flow of water to enable the said York Haven Paper Company to develop three thousand horsepower for all time after the construction of a contemplated power plant by the said York Haven Water & Power Company, said supply of water to be furnished said York Haven Paper Company without cost or charge to it, by the said York Haven Water & Power Company and delivered at headgates to be constructed at the expense of the said Power Company in accordance with plans to be approved by the York Haven Paper Company."

The court, at page 275 of the opinion, said:

> "It is apparent that the distinction between an exception and a reservation here relied upon is vital and substantial, and the question whether the stipulation in the deed be one or the other, is to be determined, not technically or by what the parties have called it, but by what was the essential character and quality of the interest or right sought to be reserved."

At page 278 of the opinion the court uses the following significant language:

> "In the case at bar, the covenants are to supply and deliver at plaintiff's headgates so much water power *for all time*, and for all time the Power Company must itself refrain from using the water

> power created by its extensive and costly works until the water power stipulated for has been furnished to the plaintiff. A perpetual and continuing performance is of the very essence of the covenants, and involves an enormous outlay of money and continuous effort on the part of the defendant. We think that the court below should not impose upon itself the duty of enforcing through the indefinite future the performance of such a contract."

The lower court, in the above case, had granted a perpetual injunction restraining the power company from appropriating for use at any time for any purpose whatsoever any water in the forebay of the said power company necessary to allow a sufficient flow of water at the said headgates to develop three thousand horsepower. The Circuit Court, at page 281 of the opinion, said:

> "We think the ends of justice and the equities of the case require a reversal of the decree below, and the dismissal of the bill without prejudice. And it is so ordered."

The appellee in the court below contended that the decision of the Supreme Court of Ohio in the case of *State ex rel. vs. Middletown Hydraulic Company, supra*, changed the rule as expressed in the cases of *Hubbard vs. Toledo, Fox vs. Cincinnati, Elevator Company vs. Cincinnati, State ex rel. vs. Board of Public Works*, and *Voight vs. Railroad Company*, and other pronouncements of the courts of Ohio holding that the use of the canal for hydraulic power was an incidental purpose, and that the State had a right to terminate leases for surplus water by abandonment of the canal without liability to the holders of the leases.

A consideration of the *Middletown* case requires a consideration first of the previous decisions of the Supreme Court of Ohio.

In the case of *State ex rel. vs. Board of Public Works, supra,* a similar objection was raised as to a lease containing provision for the State to at any time resume the use of canal water leased for hydraulic purposes, in which it was specifically provided that the state should pay for lasting improvements put on the property by the lessee. The court held that the state had the right to terminate the lease and the lessee thereof was not entitled to compensation on the ground that the board of public works possessed no power to surrender the duty of performing the public trust committed to their charge by the statutes of the state, by failing, when the public policy of the state required, to resume the water of the canal whenever the same was needed for public use, untrammeled by any condition or any right of the lessee to prevent it, and that the terms and provisions of leases must correspond to the provisions of the Act of March 23, 1840.

Again, in the case of *Voight vs. Railroad Co., supra,* the law on the subject is set forth in the syllabus as follows:

> "Contracts made with the Board of Public Works or other agents of the state, for the use of the water of the canal, terminate with the abandonment of the use of the canal by the state and no action will lie against the state for damages resulting from such abandonment."

The facts disclose that the board of public works, in consideration of the owner of a certain grist mill granting to the state the right to construct a canal

through his lands, agreed to enlarge and forever maintain a dam across the Hocking River above the grist mill so as to afford an ample supply of water both for the canal and for the mill. That canal, by an Act of the General Assembly of May 18, 1894, was abandoned for canal purposes and leased to the Columbus, Hocking Valley and Athens Railroad Company for the construction of a railroad. The owner of the lease at the time of the abandonment sought to enjoin the railway company from entering upon the lands purchased upon the ground that the abandonment of the canal would impair the contract made between the state and his predecessor in title, to whose right he had succeeded. While the court held the Act of Abandonment specifically provided that the railway company should compensate any such property holder, yet, on the question of the right and power of the General Assembly to abandon the canal and thereby terminate all contracts made by the board of public works or other agents of the state for the use of the water of the canal, the case was disposed of by the court on the ground that the state was under no obligation to keep up the canal for the purpose of navigation after the canal had become useless for such purpose and had been abandoned, and *that the agents of the state had no power to make a contract to so bind the state.*

The construction of the Act of March 23, 1840, by the *Hubbard, Fox and Elevator Company* cases was thus reaffirmed.

To hold as a matter of law that the General Assembly cannot abandon a canal for navigation purposes and direct that the lands shall thereafter be used for state highway purposes without first compensating lessees of

surplus water, would require the impossible thing of assessing the value of a water right in perpetuity or require the state to forever keep up and maintain dams, canals, feeders, etc., at the expense of the people of Ohio for all time, irrespective of the loss thereby occasioned to the state.

This contention of the appellants was adopted by the Circuit Court of Appeals in the case of *Maumee Valley Electric Company vs. City of Toledo*, 13 Fed. (2d) 98, in which there was a discussion of a number of Ohio cases; and with reference to this question at page 101 said:

> "Broadly stated, the city's defense is this: (a) Plaintiff's leases were only for surplus water, not needed for navigation purposes; (b) *the state had power at any time to abandon the canal for purposes of navigation*, and the Act of 1920 worked such abandonment; (c) there then remained no such thing as surplus water; * * *.
>
> The abstract propositions numbered (a), (b), and (c), *supra*, as there generally stated, were applied to the facts existing in *Hubbard vs. Toledo*, 21 Ohio St. 379; *Elevator Co. vs. Cincinnati*, 30 Ohio St. 629, 643; *Fox vs. Cincinnati*, 33 Ohio St. 492; *Id.*, 104 U. S. 783, 26 L. Ed. 928; *Cincinnati vs. Rogers*, 16 Ohio App. 139; *Kaukauna Co. vs. Green Bay, etc., Canal*, 142 U. S. 254, 274, 12 S. Ct. 173, 35 L. Ed. 1004; and in denial of right of action by lessees of 'surplus' water because of abandonment by the state of one portion or another of the Miami & Erie Canal for navigation purposes."

The Circuit Court of Appeals assumed for the purposes of that case "that plaintiff could not prevent the cutting off by the state of plaintiff's water privileges

even though the state was being put to no expense for maintaining the canal."

This interpretation by the Circuit Court of Appeals was after the decision of the Supreme Court of Ohio in the case of *State ex rel. vs. Middletown Hydraulic Company, supra*, which was considered and cited in the opinion (see page 102).

We must consider the *Middletown* case in the light of the rules of the Supreme Court of Ohio, which provide that the law of the case is stated in the syllabus which is required to be submitted to the judges before publication, but there is no such requirement as to the opinion of the judges. Rule VI, entered January, 1858, 5 O. S. vii; 73 O. S. x, Rule VI; 94 O. S. ix, Rule VI; *Baltimore & Ohio Railroad Company vs. Baillee*, 112 O. S. 567. This rule was recognized by this court in the case of *Ohio Railway Company vs. Dittey*, 232 U. S. 574, 589.

The *Middletown Hydraulic Company* case in order to overrule the *Hubbard, Fox, Elevator Company, State ex rel.* and *Voight* cases, *supra*, no doubt would have expressly so stated, but the Supreme Court failed to make any statement to that effect. Neither the syllabus nor the opinion of Judge Robinson mentions the cases of *Hubbard, Fox, Elevator Company, State ex rel.*, or *Voight*, nor the principles of law thereby established. The syllabus of the case does not impliedly overrule any of the prior decisions above referred to; besides, out of a consideration of the decision of the Supreme Court of Ohio in *State ex rel. vs. Edmondson*, 89 O. S. 107, and the rules of the court and the *Baillee* case, *supra*, the syllabus of the *Middletown* case must be held

to contain the law of the case restricted to the facts therein. Under these circumstances we point out the following points of difference between the earlier decisions of the Supreme Court of Ohio above referred to and the *Middletown Hydraulic Company* case.

First: *In the Middletown case there had been no abandonment of the canal for either navigation or hydraulic purposes.*

Second: The *Middletown* case was an action in *quo warranto* to determine by what right the hydraulic company was taking water from the Middletown feeder. The question of the right of the plaintiff upon the abandonment of the canal by the General Assembly was not involved.

Third: The "reservation" or "exception" involved in the *Middletown* case was of the use of the mill race and the water flowing through the same, of which the predecessor in title of the hydraulic company was in actual enjoyment at the time.

Fourth: The "reservation" or "exception" in the *Middletown* case was in the deed from the owner of the land to the State of Ohio, whereas, the alleged "reservation" or "exception" in the Minor lease was not a part of a conveyance from Minor to the State of Ohio, the state having theretofore obtained fee simple title to the property by appropriation.

From the facts in the *Middletown* case it appears that in 1824, when the state began the construction of the Miami canal, it found one Mr. Enoch in possession of a dam near the site selected for the state dam and a mill race, by the use of which he was engaged in the operation of a mill. The state negotiated a contract with

Enoch, under which it occupied his mill race with its feeder and head gates, in which a weir or gauge was placed "for the purpose of continuing to Mr. Enoch the use of the water as before the construction of the canal."

Mr. Enoch conveyed to the state by deed the lands which were occupied by the site of the canal and the towing paths, feeders, aqueducts, reservoirs, spoil banks and culverts connected therewith, and in that grant to the state inserted the following language:

> "All water privileges reserved to myself as to mill seats," etc.

There was no taking of the property of Enoch by the state, nor was there any conveyance to Enoch by the state of water rights. On the other hand Enoch voluntarily granted certain lands to the state, including the land upon which the mill race was located, and reserved from that conveyance the water power which he was then using. That water power never became the property of the state for it was never taken, appropriated or purchased by the state. The conclusion of the court in the *Middletown* case was that what the state acquired under the Enoch grant was a limited grant and a partial possession. The opinion is chiefly devoted to a discussion of the power of the canal commissioners to take such a limited grant or partial possession, and the determination of the case turned upon the decision of the court that it was possible and legal for the canal commissioners to take such a limited grant or partial possession.

It necessarily followed, therefore, that the successors in title to Enoch were entitled to take water from the feeder and that was the only question determined in

the case. *It does not follow from the Middletown case that the state is obligated to maintain the dam or the feeder for the benefit of the successors of Enoch.*

In the particular paragraph of the opinion of Judge Robinson in that case, relied upon by counsel for the appellee, Judge Robinson is careful to say that:

> "* * * the rights of the state, as such proprietor, *in this particular property*, which have not heretofore been judicially determined,"

and which were to be determined then for the first time. To our minds this language shows that Judge Robinson had thoroughly in mind the previous decisions of the court and that he entertained no purpose of changing the rule so well established. Besides, as has been shown, Judge Robinson in writing the opinion had no power or authority to overrule any previous decision of the court nor to change the law as determined by the syllabus of the case.

The controlling point in the decision of the *Middletown* case was the fact that Enoch and his successors in title did not hold the rights there involved under any grant of any kind from the State of Ohio. However, if we should give to the opinion of Judge Robinson the effect of establishing the law of the case, we think he makes this point entirely clear and says at page 450 of the opinion:

> "We think it may be conceded, *notwithstanding the reservation from the grant*, that, if the occupancy by the state of this particular feeder and the land upon which it is located had been exclusive and in denial of the claimed rights of Abner Enoch, the occupancy by the state of this feeder would have amounted to an appropriation of Abner Enoch's lands and water rights and relegated him, as to remedy, to a recovery of the value of

his property and water rights, but the State of Ohio during all this period, not only abstained from such occupancy as would appropriate the lands and water rights of Abner Enoch, but by its departmental construction affirmatively recognized his joint occupancy, so that the time, to this day, has not come when Abner Enoch, or his successors, could have the value of these property rights ascertained and compensation therefor awarded."

In the case of Minor, the state did acquire a quit claim from Minor of his riparian rights and lands which it had theretofore appropriated. He was afforded the opportunity of ascertaining and receiving compensation therefor. His compensation was determined and awarded to him and it consisted, not of the retention by him of something which he was already using, but of another and different use of water created by the construction of the dam and canal by the state. All of these considerations must be borne in mind in considering the effect of the statement so much relied upon by the appellee's counsel that the state is now engaged in the operation of a great power plant for the sale of power and water to private individuals and that the rights of the state, as such proprietor, are to be measured accordingly. No one is contending in this case that the appellee had not the right to continue to use the water from this canal during the valid term of its lease until abandonment of the canal for navigation purposes. That is the only obligation which the state assumed, and that obligation it is not undertaking to avoid. What the state is doing is now asserting its right to discontinue this canal as a canal and to devote the property of the state occupied by it to

another public purpose. The right of the state to subserve the best interest of the public in the use of the property of the state cannot be circumscribed by applying thereto rules which might apply to the affairs of private individuals, nor can its right to change the nature of the use of public property be denied for the benefit of a few private individuals or corporations.

We do not question the statement in the case of *Cleveland Terminal & Valley Railroad Company vs. State ex rel.*, 85 O. S. 251, quoted by Judge Robinson at page 448 of the opinion of the *Middletown* case, that where the state has granted and conveyed lands it will not be permitted to revoke such a grant made upon a valuable consideration which it retains. It does not, however, follow that because the state has granted to private individuals rights incident to a public use of state property that the state is thereby forever barred from abandoning the particular public use and devoting the property to another public use.

The *Middletown* case, because of the reservation or exception in the deed from Enoch to the state, restricted the nature of the title of the state to the lands thus conveyed to it; this feature of the case seemed to disturb Judge Jones and prompted his dissenting opinion because he thought that it was in conflict with the law laid down in the *Malone* case 34 O. S. 541. But the *Middletown* case did not affect nor involve the question of the power of the state to abandon her canals and devote the property to another public use. The Supreme Court of the State of Ohio has not changed the rule which has existed for many years on that question, and the *Middletown* case affords no justification whatever for changing

a proposition of law so thoroughly settled by the Supreme Court of the State of Ohio and recognized so clearly by the Supreme Court of the United States.

The District Court (Rec. 174) recognized that the principles announced in the *Hubbard, Elevator Company, Fox, State ex rel. vs. Board of Public Works,* and *Voight* cases had become the established law of Ohio. But held that thereafter the position of the state had changed from that of operating the canal as a navigable highway to the operation of a power plant for the sale of power and water to the public; that the contracts under consideration must be viewed in the light of changed and altered circumstances and that this change may call for a different solution if the altered or changed conditions warranted. The court seems to indicate that the *Middletown* case calls for a different rule of law than that established by the cases above referred to. While we believe that it is beyond doubt that the *Middletown* case did not attempt to change the established law of Ohio, still this court ought not say that the law of Ohio established for sixty years can be so set aside. The rule of this court on that subject, we think, is well stated by Mr. Chief Justice Waite in the case of *Douglass vs. Pike County, Missouri, supra.* We quote from the opinion on page 686, as follows:

> "As a rule, we treat the construction which the highest court of a state has given a statute of the state as part of the statute, and govern ourselves accordingly; but where different constructions have been given to the same statute at different times, *we have never felt ourselves bound to follow the latest decisions, if thereby contract rights which have accrued under earlier rulings will be injuriously affected.*"

This court in *Harding vs. Jordan*, 140 U. S. 371, had under consideration a case where there had been an established law of the State of Illinois. A recent decision seemed to have cast doubt upon the force of the earlier decisions. On this subject this court, through Mr. Justice Bradley, said on pages 384-385:

> "If it were not for the decision of the Supreme Court of that state in the case of *Trustees of Schools vs. Schroll*, 120 Ill. 509, 9 West. Rep. 741, we should not have the slightest hesitation on the subject. And we cannot divest ourselves of the impression that the opinion of the court in that case on the subject in hand is anomalous, and opposed to the entire course of previous decisions in the state. It is our judgment that the law of Illinois in this regard is the common law, and nothing else; * * *.
>
> "That the common law is the true and only law of Illinois on the subject of land titles, * * * is so clearly shown by the statutes, and by the whole course of the decisions of the Supreme Court of that state, that it hardly needs any argument to support the proposition."

After a review of the earlier Illinois cases this court disregarded the later decision and decided the case upon the law of the state, established by a long line of earlier cases.

It will be remembered that grants or privileges of a state will not be extended by implication, but, on the contrary, will be strictly construed in favor of the public.

> Knoxville Water Company vs. Mayor and Aldermen of Knoxville, 200 U. S. 22, 33, 34.

CONCLUSION

This case is distinguishable from the case of *Harry J. Kirk et al. vs. The Maumee Valley Electric Company*, number 674 on the docket of this court, in that the leases involved in the *Maumee Valley Electric Company* case which are affected by the abandonment of the canal (Exhibits 1-6 in that case) are not subject to the method or agreement of acquiring the same as the lease from the State of Ohio to Minor (Exhibit 1), which is the basis of the claim of appellee in the case at bar. The rights of the appellee in the case at bar are similar to the rights of the appellee under the Purdy lease (Exhibit 7) in the *Maumee Valley Electric Company* case. We think it necessarily follows that the decree of the District Court is erroneous and that the appellants are entitled to a reversal thereof and to a dismissal of the bill of complaint.

Respectfully submitted,

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JOSEPH A. GODOWN,
Solicitors for Harry J. Kirk.
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Prosecuting Attorney, Lucas County,
Solicitor for Lucas County Commissioners.

APPENDIX

I

Act of March 23, 1840. 38 Ohio Laws 87.

Swan's Statutes of Ohio, 1841, pages 174 to 200.

Sections 14009 to 14013, inclusive, of the General Code of Ohio, 1910 Edition.

* * *

"Sec. 20. Whenever in the opinion of the Board of Public Works there shall be surplus water in either of the canals, or in the feeders or at the dams erected for the purpose of supplying either of said canals with water, or for the purpose of improving the navigation of any river, and constructed at the expense of the state, over and above the quantity of water which may be required for the purpose of navigation, the said commissioner may order such surplus water, and any lands granted to, or purchased by the state for the purpose of using the same, or such part thereof as they may deem expedient, to be sold for hydraulic purposes, subject to such conditions and reservations as they may consider necessary and proper, either in perpetuity, or for a limited number of years, for a certain annual rent or otherwise, as they may deem most beneficial for the interests of the state.

"Sec. 21. The provisions of the foregoing section shall extend to and include the water passing around locks from one level to another, on either of the canals of this state.

"Sec. 22. No hydraulic power, nor right to the use of any water, shall be sold, leased or conveyed, except

such as shall accrue from the surplus water of the canal, feeders or dams, or from the water passing around any lock, after supplying the full quantity necessary for the purposes of navigation.

"Sec. 23. Every lease, grant or conveyance of water power, shall contain a reservation and condition that the state or its authorized agents may at any time resume the privilege or right to the use of water, or any portion thereof, whenever it may be deemed necessary for the purpose of navigation, or whenever its use for hydraulic purposes shall be found in any manner to interfere with and injuriously affect the navigation of either of the canals, feeders or streams from which the water shall be taken for such hydraulic purposes; and whenever such privilege shall be resumed, in whole or in part, the sum paid therefor, or the rent reserved, or such reasonable portion thereof as shall be determined upon, agreeably to the conditions and stipulations of the lease or deed of conveyance aforesaid, shall be refunded, or remitted to the purchaser or lessee, his heirs or assigns."

• • •

II

Act of March 21, 1917, 107 Ohio Laws 418, Sec. 14009 of the General Code of Ohio.

"Sec. 1. That section 14009 of the General Code be amended to read as follows:

Sec. 14009. Whenever, in the opinion of the superintendent of public works, there shall be any surplus water in any of the state canals, or in any of the feeders, or reservoirs, or at any dams created by the state for

the purpose of supplying any of said canals with water, or erected for improving the navigation of any river, over and above the quantity of water which may be required for the purpose of navigation, said superintendent of public works may sell or lease the right to use such surplus water for hydraulic or other purposes, for any term not exceeding twenty-five years for a certain annual rental, or otherwise, as he may deem most beneficial for the interests of the state, subject to such conditions, reservations and restrictions as he may deem necessary and proper. All rentals shall be fixed by the superintendent of public works with the approval of the governor and attorney general.

Provided, however, that nothing herein contained shall be so construed as to authorize the superintendent of public works to sell or lease the right to use water at any time for any purpose or to such an extent as to prejudice, abrogate or supersede any of the water rights heretofore granted by the state to the City of Akron by an act entitled 'An act to provide for granting to the City of Akron the right to use and occupy certain waters and lands of the state for water works and park purposes' and being sections 14203-1, 14203-2 and 14203-3 of the General Code.

Sec. 2. That said original section 14009 of the General Code be, and the same is hereby repealed."

III

Act of May 11, 1927, 112 Ohio Laws 360-363, Sections 14178 to 14178-12, General Code of Ohio.

Sec. 14178. Portion of Miami and Erie Canal abandoned; description.

"Sec. 1. That the portion of the Miami and Erie Canal in Lucas County, Ohio, that is described as follows, be, and the same is hereby abandoned for both canal and hydraulic purposes: Commencing at a point just below the head of the Maumee side-cut near Maumee, Ohio, thence southwesterly over and along said Miami and Erie Canal, including the full width of the bed and banks thereof, as defined by Buchanan's survey, to a point where said canal joins with the Maumee River, on the westerly side thereof, in Providence Township, Lucas County, Ohio."

Sec. 14178-1. State of Ohio reserves title to all lands and waters.

"Sec. 2. The State of Ohio reserves unto itself, the title to all lands and waters to which it is entitled under the various acts, providing for the construction of the Miami and Erie Canal and all lands now occupied by any part of the said Miami and Erie Canal, including all lands used for lock houses, waste ways or for other purposes and now the property of the State of Ohio."

Sec. 14178-2. Lands to be held for state in fee simple.

"Sec. 3. So much of said lands as were used and occupied by the Miami and Erie Canal shall be forever held for the State of Ohio in fee simple, and held by the state for the purpose of constructing upon the said lands, a highway, to be erected, constructed and improved at such time or times as the State of Ohio may hereafter, either by legislative enactment, or otherwise, find proper and convenient."

Sec. 14178-3. When existing leases shall become null and void.

"Sec. 4. All leases heretofore granted to any person, firm or corporation, for canal or hydraulic purposes on that part of the Miami and Erie Canal described in Section 1 of this Act shall become and be null and void on and after sixty days from the taking effect of this Act, and all other leases for lands heretofore granted upon such portion of the canal shall be terminated according to the terms of this Act as the same can be legally done."

Sec. 14178-4. Abandoned portion under supervision of state highway director.

"Sec. 5. The abandoned portion of said canal shall be under the supervision and control of the state highway director, to be devoted to highway and park uses and purposes as herein provided, and the director of highways of the State of Ohio is hereby authorized to, and he shall, within sixty days from the taking effect of this Act, drain the water of said abandoned portion and prevent the water of the Maumee River from flowing into or through said abandoned part of said canal."

Sec. 14178-5. Surveys and maps to be made.

"Sec. 6. As soon as practicable, after this Act goes into effect, the director of highways of the State of Ohio shall cause surveys to be made of the canal property herein abandoned, together with maps and plats of the same, and of all lands used in connection with that portion of the Miami and Erie Canal, hereby abandoned, belonging to the State of Ohio, adjacent thereto, and file a copy thereof with the governor."

Sec. 14178-6. Making of plat or plan.

"Sec. 7. The director of highways is further di-

rected to make a plat or plan, showing the highway, its length, grades and width of so much of the canal property as may be used for such highway purposes, and all other lands adjacent thereto that may be leased for other purposes."

Sec. 14178-7. Use of lands before highway is constructed and improved.

"Sec. 8. Until said highway shall be constructed and improved, no portion of the lands within the plat or plan showing such highway shall be leased for any purpose whatever, but until the State of Ohio shall construct and improve said lands for a highway, all municipal corporations through which said highway shall pass when completed, and the commissioners of Lucas County, Ohio, shall be permitted to use said canal lands for public purposes only, without compensation."

Sec. 14178-8. Leasing of adjacent lands; manner.

"Sec. 9. All other lands which may be shown on said plat adjacent to said highway and which will not be used for highway purposes may be leased under the direction of the director of highways, in the following manner:

The said director of highways shall cause said lands, not to be used for said highways, to be appraised and a report of said appraisement filed in the office of the governor, and one copy left in the office of the director of highways.

After said lands are so appraised, and upon application therefor, the lands not needed or required within said highway may be leased to any applicant for a period not to exceed fifteen years, and with the right of renewal for an additional fifteen years, upon a rental equal to

six per cent per annum upon the value of the appraisement so made, and at the end of fifteen years, said lands shall be reappraised and likewise leased to such applicant.

Provided, however, that if any municipal corporation, Lucas County, township, or other taxing district desires to lease any portion of said lands not required for said highway purposes, the same shall be leased to such taxing district upon a rental of four per cent per annum.

Said application shall be made in writing, upon forms provided for that purpose, and shall clearly describe the lands covered in said application, and shall state the term of years for which such lease is desired, and shall be signed by a public officer, duly authorized by the public authorities of the city, village, or other political subdivision making said application, and when the same shall be desired by any political subdivision.

Before granting any lease to any private individual, notice of the filing of such application shall be given to the public official of any municipal corporation, county, township, or other political subdivision in which said lands are located.

If, within thirty (30) days after such notice such officer of the political subdivision makes no application to lease said lands, the same may be leased to private persons, firms or corporations, and such application made by such private persons, firm or corporation shall be made in writing upon forms provided for that purpose, describing the lands covered in the application, the term of years for which the lease is desired, and be signed by such person, firm or corporation, and filed in the office of the director of highways of the State of Ohio.

In the event that any leases granted herein are renewed at the expiration thereof, the same shall provide for a reappraisement by proper state authorities, upon the expiration of each fifteen-year period, and the rate of rental upon such new appraisement shall be made in the same manner as the original appraisement."

Sec. 14178-9. Right to remove bridges, to grade and construct roads and streets.

"Sec. 10. The county commissioners of Lucas County, the council or other legislative body of any municipality or township through which said abandoned canal passes, shall have, and are hereby granted, the right to remove all existing bridges, crossing said abandoned portion of said canal over which county roads, city or village streets or township roads pass, and to grade and to construct such roads and streets across the channel of said abandoned portion by necessary fills and grades in the channel thereof and to such grade as shall be approved by the director of highways, and the county commissioners of Lucas County are authorized to drain the water of said abandoned portion, and to prevent the water from the river from flowing into or through said abandoned part of said canal, but reserving all rights of the State of Ohio across said roadways for any and all purposes said state or its grantees may hereafter desire to use said roadway, not in conflict therewith."

Sec. 14178-10. Sale prohibited; exception.

"Sec. 11. No portion of the canal lands and lands adjacent thereto and herein abandoned shall ever be sold, except by specific authority of the General Assembly of Ohio."

Sec. 14178-11. Defining term highway director.

"Sec. 12. The term highway director, as used herein, shall be construed to mean any officer, commission, board or department that may be established by law for the control of public highways."

Sec. 14178-12. Repealing section.

"Sec. 13. That all Acts or parts of Acts in conflict with this Act be, and the same are hereby repealed."

IN THE

Supreme Court of the United States

No. 675

October Term, 1928

HARRY J. KIRK, AS SUPERINTENDENT OF PUBLIC WORKS AND DIRECTOR OF THE DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS OF THE STATE OF OHIO ET AL.,

Appellants,

vs.

THE PROVIDENCE MILL COMPANY,

Appellee.

On Appeal From the District Court of the United States, Southern District of Ohio, Eastern Division

BRIEF ON BEHALF OF APPELLEE

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KARL E. BURR, *Columbus, Ohio,*
T. W. CHRISTIAN, *Columbus, Ohio,*
Counsel for Appellee.

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IN THE

Supreme Court of the United States

No. 675

October Term, 1928

HARRY J. KIRK, AS SUPERINTENDENT OF PUBLIC WORKS AND DIRECTOR OF THE DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS OF THE STATE OF OHIO, SUCCESSOR TO AND SUBSTITUTED FOR GEORGE F. SCHLESSINGER, AS SUPERINTENDENT OF PUBLIC WORKS AND DIRECTOR OF THE DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS OF THE STATE OF OHIO, AND ROY E. DAVIS, RALPH E. FARNSWORTH AND GEORGE R. HOFFMAN, AS COUNTY COMMISSIONERS OF LUCAS COUNTY, OHIO,

Appellants,

vs.

THE PROVIDENCE MILL COMPANY,

Appellee.

BRIEF ON BEHALF OF APPELLEE

I

STATEMENT OF THE CASE

This case is an appeal from the final decree (R. 70) on opinion of the District Court (R. 66), not officially

reported, granting and entering a permanent injunction in favor of appellee, against appellant here, defendant below, Harry J. Kirk, as a state officer of Ohio, namely, state highway director of that state, and against the other appellants here, defendants below, as proper but not necessary defendants, in a suit instituted by appellee in the District Court of the United States for the Southern District of Ohio, Eastern Division, at Columbus.

The purpose of the suit, as shown by the allegations and prayer of the bill or complaint (R. 1 to 17), was to secure for appellee a temporary restraining order, an interlocutory injunction and finally a permanent injunction suspending and enjoining enforcement, operation and execution of a statute of Ohio by restraining and enjoining action of the state officer in the enforcement and execution of the statute on the ground that it is unconstitutional, in that (a) it impairs the obligation of a certain perpetual grant, contract (Stipulation Exhibit 1, R. 37) originally entered into between the State of Ohio and one Peter Minor on September 1, 1842, but readjusted and rewritten February 23, 1846 (Stipulation Exhibit 2, R. 43) *by* which grant, as readjusted, the State of Ohio for a valuable consideration sold and conveyed to said Peter Minor, his heirs and assigns forever, a sufficient quantity of water from the Miami and Erie Canal at the Village of Providence (unincorporated), in Lucas County, Ohio, when properly applied to propel 3½ pairs of 4½ foot millstones, with all the labor saving machinery necessary for the manufacture of superfine flour and to be applied at all seasons of the year (the original agreement granted water for eight pairs of such stones); and that said statute impairs the

obligation of a certain leasing contract entered into between appellee and The Defiance Gas & Electric Company, an Ohio corporation, and hereinafter designated "Electric Company," which Electric Company in the year 1922 became the successor and owner in title to said Peter Minor of all the rights under said perpetual grant, as readjusted, and which Electric Company in the year 1922, after its acquirement of said rights entered into said leasing contract with appellee, by which said Electric Company let and leased unto appellee for a valuable consideration from the year 1922 to December 19, A. D. 2004, the flour and feed mill located on said canal and known as Pilliod mill at the Village of Providence, together with all the machinery, fixtures, tools and other equipment located in said mill, together with the right in appellee, its successors and assigns, to take sufficient water from said the Miami and Erie Canal, to be used through the mill race then and now passing under said mill, to turn one turbine wheel for the purpose of running the machinery of said mill, such right to take said water to be limited to the right to turn one turbine wheel not exceeding four feet in diameter and not exceeding two feet in height, for not exceeding ten hours per day; (b) said statute deprives appellee of its property rights in said contracts without due process of law; and (c) said statute is in contravention of and contrary to Section 19 of Article I of the Constitution of Ohio.

The case was submitted on April 14, 1928, on the application of appellee for an interlocutory injunction, supported by the verified bill of complaint and affidavits, before Honorable Maurice H. Donahue, circuit judge of the United States, and Honorable Benson W. Hough

and Honorable Smith Hickenlooper, district judges, as a court constituted under Section 266 of the Judicial Code, Section 380 of Title 28 of the United States Code, and on that day an order granting an interlocutory injunction was entered and bond was filed by appellee in compliance therewith (R. 63).

The suit was so instituted against George F. Schlessinger, as director of the department of highways of Ohio, a citizen of Ohio and resident within the jurisdiction of the District Court, Richard D. Wisda, superintendent of public works of Ohio, and Roy E. Davis, Ralph E. Farnsworth and George R. Hoffman, as county commissioners of Lucas County, Ohio. Schlessinger subsequently resigned and left office on June 15, 1928. Thereafter on September 8, 1928, a motion was filed by appellee in the case for an order substituting Harry J. Kirk as defendant in the place of Schlessinger, Kirk having been appointed to succeed Schlessinger in the office. Appellant, Harry J. Kirk, consented to the substitution, entered appearance in the cause and an order of the court substituting him as such party defendant was filed on that day (R. 67 and 69).

The cause was submitted on final hearing on December 3, 1928, was heard before and determined by the above named judges sitting as a court constituted as aforesaid, on the bill of complaint (R. 1), the answers (R. 18 and 24), a stipulation and agreement between the parties on the evidence (R. 31), Stipulation Exhibits Nos. 1 to 5, inclusive (R. 37 to 63), and argument of counsel. Thereafter the judges filed their opinion and a final decree was entered as shown at the beginning of this statement.

The bill of complaint shows that appellee is a corporation organized and existing since prior to the year 1922 under the laws of Ohio, with its principal office and place of business at the Village of Grand Rapids, Wood County, Ohio, of which State it is a citizen, residing in the Village of Grand Rapids; that it is so organized for the purpose of milling wheat, corn and other grains and manufacturing flour and other cereal products therefrom and supplying the same to the public and for the purpose of acquiring, leasing and holding all property and rights of any and all kinds necessary to be used in conducting its said business; that it occupies and operates under said lease, expiring December 19, A. D. 2004, the milling property located immediately above guard lock, being Lock No. 9 on the Miami and Erie Canal, the Pilliod mill, on the north side of the Maumee River directly opposite said Village of Grand Rapids; that Schlessinger was the duly appointed, qualified and acting director of the department of highways of the State of Ohio, and as such had jurisdiction and control over the lands and ways belonging to said state and used or intended to be used by said state as public highways, including the Miami and Erie Canal lands extending from the Maumee side-cut of said canal in Maumee, Ohio, southwesterly to the Maumee River at the point where the canal joins the river near the Village of Providence, Lucas County, Ohio; that the matter in controversy in the suit exceeds, exclusive of interest and costs, the sum of $3,000.00 and arises under the Constitution of the United States of America.

The bill further shows that on November 24, 1827, one Peter Minor acquired title to and became the owner

of a section of land containing 643 acres lying and abutting on and along the north side of the Maumee River and extending up and down said river southwesterly and northeasterly of the location of said Pilliod mill; that the State of Ohio, beginning with the year 1825, provided for the construction of and thereafter constructed what, since the year 1849, has been known as the Miami and Erie Canal, extending from the Ohio River through and from the City of Cincinnati, Ohio, northerly to and through the cities of Dayton and Defiance, Ohio, and northeasterly from the west line of the State of Ohio through said City of Defiance along the northerly bank of or on the Maumee River past said Village of Providence, through the Villages of Waterville and Maumee, Ohio, into and through the City of Toledo to Lake Erie, this section from the west Ohio state line to Lake Erie being then known as the Wabash and Erie Canal; that prior to the construction of said canal along and on the north bank of the Maumee River, past the Village of Providence, said Peter Minor had constructed a mill on his land at the present location of the Pilliod mill; that southwesterly of and up the river from his mill, he had constructed on his land a dam across the river for the purpose of diverting water through his mill race, contemporaneously constructed by him, through his said land from above the dam to and through his mill situated as aforesaid; that thereafter the State of Ohio in constructing this section of the canal (this construction began in 1837 and was completed in 1842), constructed it through said mill race of Peter Minor using his land and destroying his water power, and in that construction tore down and removed his mill, erected said Lock No. 9

or guard lock at its present location as shown on Stipulation Exhibit No. 5 (R. 63), and completed the construction of said canal on northeasterly to Lake Erie as aforesaid; that the State of Ohio as a means of furnishing water for the operation of the canal, constructed a dam (Grand Rapids State Dam) across the river at the location of the dam constructed by Minor (Stipulation Exhibit No. 5, R. 63); that thereafter on September 1, 1842, the State of Ohio, through the board of public works, for the purpose of compensating Minor for the destruction of his mill and to restore to him the water he had theretofore been using by virtue of his riparian ownership on the Maumee River in the operation of his mill, paid him $2500.00 for destruction of the mill and properly executed and delivered to him the perpetual grant of water hereinabove described; that thereafter and prior to February 10, 1846, the state being unable to furnish water for the eight pairs of millstones, Minor made claim against the State of Ohio for a readjustment of the perpetual grant of September 1, 1842, and on February 10, 1846, the General Assembly of Ohio adopted a resolution, which provided

> "that the board of public works are hereby authorized to examine the claim of Peter Minor, for the non-performance of a certain contract entered into by R. Dickinson, acting commissioner of the board of public works, with the said Minor, on the first day of September, one thousand eight hundred and forty-two, and all other matters in dispute between the state and the said Minor, and that they report to the commissioners of the canal fund any further sum which they may find due him; provided that the said Minor shall, before the investigation of his claim, execute and deliver

> to the said board a full and final release to the state of all further claims of any description, except so much as may be awarded to him by said board under this resolution" (R. 43);

that on February 23, 1846, an adjustment was made between Minor and Ohio in pursuance of the resolution, through which adjustment and agreements then entered into between him and the state he was paid an additional award of $2800.00 and was granted the right to himself, his heirs and assigns forever, to draw sufficient water from said canal for hydraulic purposes from just above said guard lock to operate 3½ pairs of 4½-foot millstones (Stipulation Exhibit No. 2, R. 43); that ever since that time Minor and his successors in the chain of title, including appellee, have had the use of the water power thus assured to them under the agreement of September 1, 1842, as readjusted as aforesaid; that said Pilliod mill was thereafter erected on the site of Minor's former mill and it has been operated there for about 50 years by successors in title to said Peter Minor in the ownership of the water rights under the perpetual grant of September 1, 1842, as readjusted on February 23, 1846, the water called for by the grant, as readjusted, being used in operation of this mill; that in the year 1922 the Electric Company became the owner of all the rights under the perpetual grant, readjusted as aforesaid, as a successor in title thereto of Peter Minor, that thereafter, that year, appellee entered into the lease and agreement, ending December, 2004, with Electric Company under the terms, provisions and conditions set forth in that lease (Stipulation Exhibit No. 3, R. 49), and as hereinabove described; and that the present State Dam is the successor of the original State Dam, with which the state

replaced Minor's dam. It is about 1000 feet long, 12 feet high, and creates a water power by reason of the 20 miles of water impounded back of it. The flow of the water in the canal is regulated by Lock No. 9, constructed by the state as a part of the canal in 1842. There was no navigation on this canal for more than 30 years prior to the institution of this suit.

The bill of complaint further shows the passage by the General Assembly of Ohio on May 11, 1927, of the Act attacked in this case (112 Ohio Laws 350; Appendix, this brief), which Act declares an abandonment for both canal and hydraulic purposes of that part of the Miami and Erie Canal extending from its connection with the Maumee River above the Grand Rapids State Dam northeasterly to the Maumee side-cut in Maumee, Ohio; attempts to declare all water leases, contracts and grants on said portion of said canal to be null, void and of no effect and directs the highway director of Ohio to drain the water out of said canal and prevent the water of the Maumee River from entering the same; that said Act attempts so to declare the perpetual grant to Peter Minor and appellee's said leasing contract null, void and of no effect without making or providing for the making in any way of compensation to appellee for the loss of its rights under said contracts, and that said highway director intended and was threatening to comply with the commands of said Act and therein drain all the water out of said canal and away from said mill and prevent the waters of the Maumee River from entering said canal, and all this without making any compensation to appellee for such destruction of its rights under said grant and leasing contract. The Act also author-

ized the county commissioners of Lucas County, Ohio, to drain the water from the canal and prevent the water of the river from flowing into or through it, the purpose and effect of these provisions being to deprive appellee of its water power, render its plant useless and wipe out its milling business, which has been carried on without interruption for about 50 years, last past.

All of the above facts are admitted in the answers of appellants (R. 18), and under the stipulation and agreement between the parties it is admitted that the water used by appellee in the operation of said mill, under appellee's said leasing contract, constitutes a water power of at least 225 horsepower and is of a value in excess of $75,000.00 (R. 35).

In the stipulation between the parties it is further agreed that the original leases, agreements, grants, deeds, records of administrative boards, legislative or other resolutions, map of the canal, and special and general laws of the States of Ohio and Indiana and of the Congress, all as listed or referred to on Stipulation Exhibit No. 4 (R. 57), may be considered as offered and received in evidence without formal proof, and that copies of the same, respectively, except constitutional sections and resolutions and laws, are attached to the stipulation and may be used in evidence in lieu of the originals and be designated as "Stipulation Exhibits" numbered consecutively from 1 up (R. 31);

That Lock No. 9, or guard lock, is also known as Lock No. 44;

That Stipulation Exhibit No. 1 is a true copy of the agreement between the State of Ohio and Peter Minor,

executed on the 1st day of September, 1842, as alleged in the bill of complaint (R. 32);

That Stipulation Exhibit No. 2 is a true copy of the correctly recorded official proceedings of the board of public works of Ohio, which proceedings were taken and recorded in the board's office on February 23, 1846, and show the readjustment of the rights of Peter Minor under the contract of September 1, 1842 (R. 32);

That Stipulation Exhibit No. 3 is a true copy of appellee's lease with The Defiance Gas & Electric Company, executed in the year 1922 and being the lease referred to in paragraphs 1 and 10 of the bill of complaint, said lease running to December 19, A. D. 2004 (R. 31, 1 and 15);

That Stipulation Exhibit No. 4 is a list of legislative Acts and resolutions considered as in evidence in the case (R. 57);

That Stipulation Exhibit No. 5 is a map of the Miami and Erie Canal and is a true representation of all the data shown thereon (R. 63).

It is also agreed that the Electric Company is the owner of all the water power and other rights granted by the State of Ohio to Peter Minor in 1842 and 1846, but that its ownership is subject to the rights of appellee under the lease between the Electric Company and appellee (R. 34);

That the present Grand Rapids State Dam is constructed of highest grade reinforced concrete in compliance with the highest standards of engineering requirements for such work, and that guard lock, or Lock No. 9, is constructed of stone in compliance with similar requirements (R. 34);

That the waters in the canal run northeasterly at all times from the pool of the Maumee River above the State Dam and past appellee's mill known as the Pilliod mill (R. 35);

That appellee has at all times since its acquirement of said lease complied with all the terms and provisions thereof and of the lease of said Peter Minor (R. 36); and

That appellee is still operating said Pilliod mill under said lease agreement with the Electric Company and therein is using the amount of water stipulated in said lease for it to use in such operation (R. 36).

II

SUMMARY

(1) **Whatever May Have Been the Capacity in Which the State Functioned in Respect of the Miami and Erie Canal While Used for the Purposes of Navigation, and Whatever the Previous Decisions in Actions at Law Brought by Lessees of Water Against the State's Grantees of Abandoned Canal Property, It Is Now the Settled Law of Ohio That, as to Water Power Rights Not Heretofore Judicially Construed and Determined, the Function of the State Is That of a Commercial Proprietor Engaged in the Sale of Water to Individuals for Power Purposes; and the Rights and Obligations of the State as Such Proprietor Are the Same as Those Applicable to Like Transactions Between Individuals. State ex rel. Crabbe, Attorney General vs. Middletown Hydraulic Company, 114 O. S. 437.**

(2) The Foregoing Rule Announced in the Case of State ex rel. vs. Middletown Hydraulic Co., Supra, Is Consistent With the Proprietary Function of the State in Respect of Its Canals Ever Since Their Inception.

(3) Construing Together the State's Occupancy of Minor's Property When the Canal Was Constructed in 1842 and the State's Grant to Minor Dated September 1, 1842, the State's Title to Minor's Property Was Never More Than a Qualified Fee, i. e., a Fee Subject to Minor's Fee Simple Title to the Water Power.

(4) The Right of the State to Grant a Water Power in Perpetuity.

(5) Entirely Apart from the Decision of the Ohio Supreme Court in State ex rel. vs Middletown, etc., Co., Supra, No Case Has been Cited Sustaining the Right of the State to Abrogate by Legislative Enactment a Water Power Grant Such as the One in the Case at Bar. The Proposition That the State, by the Enactment of a Canal Abandonment Act Whereby All Water Power Rights Theretofore Granted Are Declared Void, May Extinguish Water Power Rights Such as Those of the Plaintiff, Is Unsupported by Any Decision Upon Which the State Relies.

(6) Appellee Has No Adequate Remedy at Law.

(7) The Abandonment Act of April 4, 1927, 112 Ohio Laws 360, Shows on Its Face That Its Enactment Was Not in Good Faith.

(8) The Abandonment Act of April 4, 1927, 112 Ohio Laws 360, Directly Impairs the Obligation of the State's Contract with Minor, and, as Such, Deprives Appellee, as His Successor, of Its Property Without Compensation and Without Due Process of Law in Contravention of Section 10 of Article I of the Constitution of the United States and Section 1 of Article XIV of the Amendments to the Constitution of the United States.

III

ARGUMENT AND AUTHORITIES

(1) Whatever May Have Been the Capacity in Which the State Functioned in Respect of the Miami and Ehie Canal While Used for the Purposes of Navigation, and Whatever the Previous Decisions in Actions at Law Brought by Lessees of Water Against the State's Grantees of Abandoned Canal Property, It Is Now the Settled Law of Ohio That, as to Water Power Rights Not Heretofore Judicially Construed and Determined the Function of the State Is That of a Commercial Proprietor Engaged in the Sale of Water to Individuals for Power Purposes; and the Rights and Obligations of the State as Such Proprietor Are the Same as Those Applicable to Like Transactions Between Individuals. State ex rel. Crabbe, Attorney General, vs. Middletown Hydraulic Company, 114 O. S. 437.

The foregoing rule, announced by the Supreme Court of Ohio in the recent case of *State ex rel. Crabbe,*

Attorney General, vs. The Middletown Hydraulic Company, 114 Ohio State 437, would seem to settle the issues here in favor of the appellee. There the court said:

> "Whatever may have been the capacity in which the state functioned in the construction of the Miami and Erie Canal for the purpose of a navigable highway across the state for the use of the general public, its function now, since the abandonment of the canal as a navigable highway, is that of a commercial proprietor, engaged in the operation of a great power plant for the sale of power and water to private individuals, and the rights of the state, as such proprietor, in this particular property, which have not heretofore been judicially determined, but are to be determined now for the first time, should be and will be measured by rules that are applicable to proprietors generally and applicable to like transactions between private individuals.
>
> 'In conducting transactions with respect to its lands, the state acts in a proprietary, and not in a sovereign capacity, and, being amenable to all the rules of justice which it prescribes for the conduct of its citizens, it will not be permitted to revoke a grant of lands made upon a valuable consideration which it retains.' *Cleveland Terminal & Valley Rd. Co. vs. State ex rel.*, 85 Ohio St. 251; 97 N. E. 967; 39 L. R. A. (N.S.) 1219."

Again, at page 457 the court said:

> "The third defense, that the state, having abandoned the purpose for which it acquired its Miami and Erie Canal water rights, is now without authority of law exercising those water rights for a wholly different purpose, is met by the two principles heretofore discussed,
>
> (1) That in its proprietary capacity, its property rights are the same as those of private proprietors.

(2) That the specific purpose for which it acquired water rights does not limit it to the use of those rights for that purpose, unless it is expressly prohibited from using them for any other purpose, but the specific purpose for which they were acquired operates as a limitation of quantity and not of character of use.

The demurrer to the third defense is sustained."

In that case the facts were strikingly similar to those in the case at bar. There one Abner Enoch, the owner of a dam across the Miami River near the City of Middletown, together with a mill and mill race adjacent to the river, sold a part of his property to the state for canal feeder purposes, excepting in his grant "all water privileges reserved to myself as to mill seats, etc." As in the case of Minor's dam in the case at bar, Enoch's dam was replaced with a new dam owned by the state, and continuously thereafter for almost one hundred years the water from the pool created by the dam had been used to supply the Miami and Erie Canal by means of the feeder, the latter of sufficient capacity to supply the requirements of both Enoch's mill and the canal. The Hydraulic Company was Enoch's successor in the title to the mill property and its appurtenant water rights, and at the time when the action was commenced, also as in the case at bar, the canal had long been abandoned for navigation purposes. At a point on the canal below the Hydraulic Company's mill, however, the state was leasing the canal waters to lessees for hydraulic purposes, and the object of the action was to determine by what right the Hydraulic Company was using a portion of the water which otherwise would have been available

to those lessees of the state. Except for the fact that in the case at bar the state is attempting to *destroy* the appellee's water power for the benefit of Lucas County and the municipalities adjacent to the canal instead of attempting to take the water from the appellee in order to give it to other lessees, the cases are precisely the same. To state the two cases as concisely as possible, in the *Middletown* case the Supreme Court sustained in perpetuity a water power contemporaneously reserved to the owner in his grant of mill property required by the state for canal purposes. In the case at bar, instead of a water power reserved to the mill owner in his grant to the state, the state contemporaneously with its acquisition of the mill property for canal purposes, recognized and confirmed the owner's water power by a grant to him in perpetuity. In the one case the water power was created by express reservation in the owner's grant to the state; in the other by express provision in the state's grant to the owner. In principle the two cases are precisely the same.

That the Supreme Court intended, by the enunciation of the rule above stated, to definitely fix the status of the state in respect of its water power as that of a *proprietor*, bound by the same contractual obligations as an individual, and also to refute the proposition that the state, in its sovereign capacity, may abrogate its water power contracts at will, is clearly shown from the dissenting opinion of His Honor Judge Jones, page 459 and particularly page 464, wherein the learned judge relies upon the cases of *Hubbard vs. Toledo*, 21 O. St. 379; *Fox vs. Cincinnati*, 33 O. St. 492; *State ex rel. vs. Cincinnati*, 37 O. St. 157, and the other cases relied upon

by the state in the case at bar, to support his contention that the state was under no obligation to continue the furnishing of water under Enoch's grant. The majority of the court, however, affirmed the validity of the grant and, *sub silentio*, overruled the dicta in those cases at least in so far as applicable to Enoch's grant in that case and the grant to Minor in the case at bar. The cases *supra* will be considered in greater detail in the subsequent pages of this brief; suffice it to say at this point that no one of them presented a situation similar to that in the case at bar. Here, prior to the coming of the canal, Minor was in possession of his water power and mill property *in fee simple*. The state appropriated his mill and mill race, including his water power, and thereupon, by way of restitution, restored the water power to him subject only to the necessities of navigation. The grant was an *absolute* one to Minor, his heirs and assigns forever. He was in no sense a *lessee*. By so restoring the water power to him the state was carrying out its moral and legal obligation so to do, and having done so, the moral obligation alone, quite apart from the legal one, was sufficient to support the contract. As said by the court in the case of *Maumee Valley Electric Co. vs. Toledo*, 13 Fed. (2nd) 98, 104, wherein the City of Toledo was enjoined from interfering with the leased water along the eighteen-mile level of the canal immediately south of the city:

> "Assuming, *without so deciding*, that the state could have lawfully terminated plaintiff's water rights and privileges by an abandonment of the canal for navigation purposes and a sale of the canal lands, it is enough that, as we think, *it chose rather to recognize its moral obligation* to respect

> the rights of its lessees, property holders and citizens. That it had the legal and moral right to do so is undeniable. A contrary course would have been unnatural and inequitable."

Having, as said by the court in that case, the legal and moral *right* to respect its grant of water power, the state, as a proprietor, is under the corollary *obligation* to respect its grant in the case at bar.

Nor will the court fail to note the insistence with which the Ohio Supreme Court in the *Middletown* case upheld the water power as valid, not only in Enoch, but in his heirs and assigns, including the Hydraulic Company, notwithstanding the reservation in Enoch's grant contained no words of perpetuity. To do so the court was required to look to the *intention* of the parties as evidenced by the act of the state in permitting Enoch and his assigns the unmolested use of the water power over a long period of years. In the case at bar the court is under no such embarrassment in respect of words of perpetuity, the grant being expressly to Minor, "his heirs and assigns forever," and on the subject of intention, it is only necessary to point out that for more than eighty-five years last past Minor and his successors in title have been regarded by the state as the absolute owners of the water power subject only to the necessities of navigation. On this subject the court in the *Middletown Hydraulic* case, at page 453, said:

> "This court in the case of *Miller vs. Wisenberger*, 61 Ohio St. 561; 56 N. E. 454, declared:
>
> 'Section 8 of the Canal Act of 1825 should be so construed as to fairly carry out the intention and understanding of the officers of the state on the

one hand, and the landowner on the other, in each case, as near as the same can be ascertained from what was done, and the situation and surroundings of the premises in question.' "

Looking further to the intention of the parties at the time when Minor's grant was executed, there can be no serious question but that the state, having appropriated the water power which he owned in fee simple and had never willingly relinquished, intended by the grant to him, his heirs and assigns forever, to restore the water power to him in fee simple, subject only (as heretofore observed) to the demands of navigation, just as in the *Middletown Hydraulic* case the state, being about to appropriate Enoch's water power likewise owned by him in fee simple, was held to have intended, by the acceptance of his grant even without words of perpetuity, to confirm the water power to him in fee simple. If not, it is pertinent to inquire why Minor and his successors, including the appellee, have been permitted the unmolested use of the water during all of these years? What did the state intend by the grant to Minor, his heirs and assigns forever, except to convey a fee? Should the intention as expressed by those words be any the less enforced in this case than the intention in the *Middletown Hydraulic* case, where no such words were used? And, if as held in that case, the grant was valid in Enoch and his successors, and if, as further held there, the state in respect of its canal property "acts in a proprietary and not in a sovereign capacity, * * * amenable to all the rules of justice which it prescribes for its citizens," can there be any question as to the rights of the appellee company, which not only relies upon a grant in fee

simple but a grant made in extinguishment of an obligation twice recognized by the state as valid?

It is unthinkable that as compensation for his valuable property and rights owned in fee simple the state intended to grant or Minor intended to accept anything less than a water power in fee simple.

(2) The Foregoing Rule Announced in the Case of State ex rel. vs. Middletown Hydraulic Co., Supra, Is Consistent With the Proprietary Function of the State in Respect of Its Canals Ever Since Their Inception.

In the light of legislative history it will not do to say that the state's function as a proprietor of a water power system is a mere incident, an accident, or its water power created by the canal system a mere by-product, or a left-over, not within the contemplation of the legislature at the time when the canals were originally authorized. From the very beginning the state was not only mindful of the water power to be created by the canal system but determined, as a proprietor, to derive all of the revenue possible from it; in fact, as early as the Act of February 4, 1825, 23 O. L. 50, Chase's Statutes, Vol. 2, page 1472, the state pledged in Section 5,

> "all the net proceeds of tolls, collected on the canals herein described, and of the rents and profits of all works and privileges connected with or appertaining to said canals and belonging to the state."

Also Section 6 of that Act provides that the money pledged and appropriated by the Act,

> "together with the net proceeds of all tolls and of the rents and profits of all works and privileges

> connected with said canals, shall be paid into the state treasury and shall be kept distinct and apart from other moneys belonging to the state."

The "works and privileges" mentioned in those sections referred, of course, to hydraulic works and privileges.

Likewise, the Act of February 7, 1826, Chase's Statutes, Vol. 3, page 1527, authorized the canal commissioners to procure by purchase or otherwise, sufficient land

> "at each and every point on and adjoining the Ohio canals heretofore authorized to be constructed, where the surplus water passing through said canals may be profitably used for hydraulic purposes."

That is to say, not only would the state utilize the water power created by the canals, but the commissioners were definitely authorized to acquire land at points where the power could be used for hydraulic purposes—"profitably used," the Act says.

Section 2 of the same Act authorized the commissioners to sell any lands or lots theretofore acquired for canal purposes,

> "other than those which are situated at points or places on, or adjoining, the line of the Ohio canals, where the surplus water produced by said canals can be advantageously used for hydraulic purposes."

Also Section 5 of the Act of February 11, 1828, Chase's Statutes, Vol. 3, page 1598, authorized the commissioners to sell for hydraulic purposes any water which might "be spared from any state canal or works connected therewith."

The Act of February 18, 1830, Chase's Statutes, Vol. 3, page 1659, after forbidding the use of any canal water for hydraulic purposes except that purchased from the canal commissioners, provides at Section 3 that if, in the opinion of the commissioners, there shall be surplus water in either the canals or their feeders, or at the dams erected for the purpose of supplying the canals with water,

> "the said commissioners may order such surplus water, and any lands granted to, or purchased by the state, for the purpose of using the same, or such part thereof as they may deem expedient, to be sold for hydraulic purposes; subject to such conditions and reservations as they may consider necessary and proper, either in perpetuity, or for a limited number of years for a certain annual rent or otherwise, as they may deem most beneficial for the interests of the state."

The Act of March 3, 1831, Chase's Statutes, Vol 3, page 1862, refers to the construction of feeders and canals "by which a greater quantity of water may be introduced than is required for the purpose of navigation, thereby creating valuable hydraulic privileges," and authorizes the commissioners to convey part of the water so created as compensation for damages to mill sites due to the construction of the canals. Some of the foregoing Acts will be referred to at greater length *post*, the purpose of citing them here being to show beyond peradventure of doubt that from the very beginning of the canals, and as an important result of their construction —even as a part of the inducement to their construction —the state had in mind the creation of a most valuable water power. Furthermore, the Act of February 7, 1826,

supra, 24 O. L. 58, definitely appropriated the sum of $20,000.00 for the purpose of acquiring suitable land along the canals where water could be profitably used for hydraulic purposes. By the Act of January 12, 1837, 35 O. L. 6, an additional sum of $25,000.00 was appropriated for the same purpose, and by the Act of April 3, 1837, 35 O. L. 6, these amounts were increased by further appropriations. Other and subsequent laws enacted by the legislature from time to time make provision for the state's water power and the resulting revenues, but it is not necessary to encumber this brief with cumulative citations on the subject.

Finally, on this branch of the case, the principle announced in the *Middletown Hydraulic* case, in substance, that in respect of its water power the state is bound by its contracts to the same extent as an individual involves no new principle of law, but rather, the natural inclusion of the state's water power within the category of property in respect of which the state's position always has been that of a proprietor. Had the state chosen in this case, upon the cessation of navigation, to discontinue the canal, sell the land, and retire from its position as the sovereign operator of a navigable highway as in the *Hubbard* and kindred cases, other considerations might apply. Instead, and having long ago abandoned the use of the canals for navigation, the state chose to maintain the canals for water power purposes, and in that respect its position is and could be only that of a proprietor, bound by its contracts as an individual. There is no reason why the state should not be so bound. There is every reason why it should be. Annually throughout the United States large sums of money are expended in the

creation of water power; there is an almost universal demand for the preservation of existing power and the development of additional power. Irrespective of the rights under the Minor grant, the Act of the legislature in attempting to destroy the valuable water power in issue here for alleged municipal purposes, constitutes almost an act of vandalism. But entirely apart from that, water power is now a recognized commodity in which a state deals exactly as in respect of its lands, *i. e.*, as an individual, and the Supreme Court of Ohio was right in declaring that in respect of Ohio's not inconsiderable water power, the function of the state is that of a commercial proprietor.

From time immemorial the rule has been that the state, in respect of its canal *lands*, acts in a proprietary capacity, and as such, will not be permitted to revoke a grant of lands made upon a valuable consideration which it retains. In principle, the rule applies with equal force to its grants of canal waters. On this subject, the first clause of the syllabus in *Cleveland Terminal, etc., Co. vs. State*, 85 O. St. 251, is as follows:

> "1. In conducting transactions with respect to its lands the state acts in a proprietary, and not in a sovereign capacity, and being amenable to all the rules of justice which it prescribes for the conduct of its citizens, it will not be permitted to revoke a grant of lands made upon a valuable consideration which it retains."

Nor will the court fail to note that in the case at bar, just as in that case, the state by the abandonment Act of 1927 expressly retains the land, mill property and mill race ceded by Minor to the state in consideration of the water power. Section 2 of the Act (112 Ohio Laws 350)

provides that the state reserves unto itself "the title to all lands and water to which it is entitled under the various Acts providing for the construction of the Miami and Erie Canal and all lands now occupied by any part of the said Miami and Erie Canal * * *." That being so, the following from the opinion of Mr. Justice Story in *Charles River Bridge vs. Warren Bridge*, 11 Peters 420, cited with approval in *Cleveland Terminal, etc., Co. vs. State*, *supra*, is pertinent:

> "But what, I repeat, as most material to be stated, is that all this doctrine in relation to the king's prerogative of having a construction in his own favor, is exclusively confined to cases of mere donation, flowing from the bounty of the crown. Whenever the grant is upon a valuable consideration, the rule of construction ceases; and the grant is expounded exactly as it would be in the case of a private grant, *favorably to the grantee*. Why is this rule adopted? Plainly *because the grant is a contract*, and is to be interpreted according to its fair meaning. It would be to the dishonor of the government that it should pocket a fair consideration, and then quibble as to the obscurities and implications of its own contract."

(3) Construing Together the State's Occupancy of Minor's Property When the Canal Was Constructed in 1842 and the State's Grant to Minor Dated September 1, 1842, the State's Title to Minor's Property Was Never More Than a Qualified Fee, i. e., a Fee Subject to Minor's Fee Simple Title to the Water Power.

The exact date when the state took possession of Minor's property is not known, but at page 3 of the bill it is shown that the Wabash and Erie Canal (later the

Miami and Erie Canal) begun in 1837 at the Ohio-Indiana state line, was constructed from there to the Town of Defiance where it joined the Miami Extension Canal then under construction, and that subsequently, in 1842, the canal was extended from Defiance to Providence and thence to Toledo. The state's taking of Minor's property, therefore, and its contemporaneous grant to him of September 1, 1842, not only negatived any intention on the part of the state to occupy the property *exclusively*, but indicated a plain intention on its and Minor's part that there was to be a *joint occupancy* between them. Certainly if there was any exclusive occupany by the state it was not for a long enough period to import a fee simple title under the doctrine of *Malone vs. Toledo*, etc., and the other cases where only the long, open, notorious and exclusive occupancy and use of property for canal purposes was held to have created a fee simple title in the state. There is absolutely nothing in the record in this case proving or even tending to prove that the state ever intended to deprive Minor of his water power entirely or ever intended to occupy his property to the exclusion of his right to use the water power in perpetuity. Upon a like set of facts the tenancy as between the mill owner and the state in the *Middletown Hydraulic* case was held to be *joint*, with a water power in him in fee simple and a qualified fee in the state. It is the position of the appellee, therefore, that notwithstanding the decisions of the Ohio Supreme Court in *Malone vs. Toledo*, 34 O. S. 541; *State ex rel. vs. Ry. Co.*, 53 O. S. 189, and *State vs. Snook*, 53 O. S. 521, wherein the state's title is held to be one in fee simple, none of those cases are controlling here, particularly the hold-

ing in *State vs. Ry. Co.*, 53 O. S. 189, that "whenever the state actually occupied a parcel of land for canal purposes, a fee simple title thereto at once and by virtue alone, of such occupancy, vested in the state." There, inasmuch as it was conceded that the land in controversy had been long and exclusively (for more than thirty years) used as a part of the canal system, the foregoing statement could not have been directed to any contested point in the case, but was intended to stress the fact that there must be actual rather than constructive occupancy. Certainly the case is not an authority for the proposition that occupancy, accompanied by a contemporaneous acknowledgment of a water right in the mill owner, would vest the state with a fee simple title, or even that occupancy for a mere week or month or year, followed by such an acknowledgment, would create a fee simple title in the state. As said by the Ohio Supreme Court in *Smith vs. State*, 59 O. S. 278-281, construing *State vs. Ry. Co., supra*:

> "It may be remarked in passing that, inasmuch as there was no real contention as to the fact of appropriation by the state of the land in controversy and its *long* exclusive use as part of the canal system, this proposition of the syllabus (in *State vs. Ry., supra*) settled no contested point in the case, and may properly be treated as simply a predicate for the proposition which follows. However, the term 'actually occupied' imports, *ex vi termini, exclusive* occupancy; so that it would be necessary to show that a claimed occupancy by the state was an exclusive occupancy in order to bring the case within the letter of the proposition. This, we think, the facts fail to establish in the case at bar."

In *Miller vs. Wisenberger*, 61 O. St. 561, the court held that Section 8 of the Act of 1825, *supra*, should be so construed as fairly to carry out the intention and understanding of the officers of the state on the one hand and of the land owner on the other; also that the use of lands or streams for canal purposes, not of a character to apprise the owners that their property was being appropriated in fee simple, did not vest a fee simple title in the state:

> "This section of the statute (Act of February 4, 1825, 23 O. L. 56, Chase's Statutes, p. 1475) should be fairly construed, not rigidly in favor of either party. It should be regarded by the courts at this late day as it was looked upon in the days when the canals were constructed; and to wrest the lands from the owners and vest a fee thereto in the state, facts should appear from which a court can *clearly* see that both parties knew or should have known at the time of the construction of the canals that the lands in question in any particular case had been appropriated and used for canal purposes." (The italics are ours.)

Under those decisions the state's title, to the extent derived from mere occupancy and use, was one in fee simple only when that use was long and notorious and inconsistent with a lesser estate, such as a qualified fee. In the *Middletown Hydraulic* case the court holds categorically that under Section 8 of the Act of February 4, 1825, 23 Ohio Laws 56 (and notwithstanding the decisions in *Malone vs. Toledo, etc.*), the state's title to canal property may lawfully be a qualified fee, *i. e.*, one subject to a reserved water power in the mill owner, thereby creating a joint tenancy; that such joint tenancy may be created by grant *or otherwise*, and that the intention of

the parties as shown by their contemporaneous acts—even by their subsequent conduct—determines the quantum of the estate which each retained or acquired in the property occupied and used for canal purposes. The court said, page 452:

> "There is no provision in the Act expressly prohibiting the canal commissioners from taking less than a fee simple by gift or grant, and, if prohibition is so implied it must be in the language above quoted. Can it be said that it is there clearly implied? The prior decisions of this court, while expressed in broad language, were not based upon facts similar to the facts presented in this case, and the question of the title of the state to the lands there in controversy was not based upon a limited grant or a partial possession and it must be remembered that those decisions were not pronounced until long after the rights of the parties to this action had come into existence by their own particular circumstances, and this court has not yet passed upon the right of the canal commissioners by grant to take *less than a fee simple*. In that situation the departmental construction of its power in that respect, under the Canal Act, acquiesced in and acted upon by all parties interested for so long a period, is at this time a very potent factor in the interpretation of the extent of the power conferred by that Act upon the canal commissioners.
>
> * * * That case (*State ex rel. vs. Ry. Co.*, 53 O. S. 189) is not controlling in the instant case, for the reason that under the averments of the answer and the facts, as disclosed by the exhibits, which, by stipulation, are made a part of the answer, the occupancy of the state was never exclusive, but was an occupancy, *whether under grant or otherwise*, that at all times recognized the right of Abner Enoch and his successors to a joint use

> of the water which passed through that particular feeder, and therefore a joint use of the water and the land upon which the feeder is located."

Had there been a legal condemnation of all of Minor's property, including his water power, and no agreement of September 1, 1842, the state's title would have been one in fee. Here, however, if the state is to prevail it must be upon the theory that, notwithstanding the state's agreement, mere occupancy and temporary use are sufficient to create the highest, the most perfect of all titles, to-wit, a title in fee simple. Under the unusual facts in this case, with the equities so clearly in favor of the plaintiff, every presumption in favor of its title and against the state's title should be indulged:

> "Occupancy by the state for canal purposes of an island in a state reservoir as against the owner, in the absence of condemnation must be actual, open, notorious and direct."
>
> State vs. Fenn, 25 O. C.; 35 C. C. Rep. 75.

(4) The Right of the State to Grant a Water Power in Perpetuity.

On this subject it is respectfully submitted that if the state could, by accepting a grant reserving to the grantor a water power in perpetuity, thereby creating or carving out a water power valid in the owner, his heirs and assigns, as was held in the *Middletown Hydraulic Company* case, the state had an equal right to recognize or create in Minor in the case at bar a like water power in perpetuity, particularly in view of the equities presented by the case. Certainly the position of the Hydraulic Company in the *Middletown* case is now that of

the owner of a valid water power in fee simple. That water power was created by the act of the state in accepting Enoch's grant in which the water power was so reserved. Can it be said that in the case at bar the appellee company, as Minor's successor, is any the less an owner in fee simple merely because instead of taking a grant from him in which the water power could have been thus reserved in perpetuity, the state chose by its agreement of September 1, 1842, to confirm a like water power to him in perpetuity? We think not.

Entirely apart from that, however, *there was, at the time of the grant to Minor, express authority in the state to dispose of water for hydraulic purposes either in perpetuity or for a limited number of years.* Section 3 of the Act of February 18, 1830, Chase's Statutes, Vol. 3, page 1659, provided as follows:

> "Sec. 3. That whenever, in the opinion of the board of canal commissioners, there shall be surplus water in either of the canals, or in the feeders, or at the dams erected for the purpose of supplying either of said canals with water, or for the purpose of improving the navigation of any river, and constructed at the expense of the state, over and above the quantity of water which may be required for the purposes of navigation, the said commissioners may order such surplus water, and any lands granted to, or purchased by, the state, for the purpose of using the same, or such part thereof as they may deem expedient, *to be sold for hydraulic purposes;* subject to such conditions and reservations as they may consider necessary and proper, *either in perpetuity, or for a limited number of years,* for a certain annual rent or otherwise, *as they may deem most beneficial for the interests of the state.*"

Section 6 of the same Act is as follows:

> "Sec. 6. That every lease, grant, or conveyance of water power, shall contain a reservation and condition, that the state or its authorized agents, may at any time, resume the privilege or right to the use of the water, or any portion thereof, whenever it may be deemed necessary *for the purposes of navigation, or whenever its use for hydraulic purposes shall be found in any manner to interfere with*, and injuriously affect, the *navigation* of either of the canals, feeders or streams from which the water shall be taken for such hydraulic purposes; and whenever *such* privilege shall be resumed, in whole or in part, the sum paid therefor, or the rent reserved, or such reasonable portion thereof as shall be determined upon, agreeably to the conditions and stipulations of the lease or deed of conveyance aforesaid, shall be refunded, or remitted to the purchaser or lessee, his heirs or assigns."

In the following year (March 3, 1831) the legislature passed the Act entitled "An Act to provide for the purchase of water privileges," Chase's Statutes, Vol. 3, page 1862, in part as follows:

> "That where any feeder to either of the canals of this state, from any stream, which is not navigable and a public highway has been constructed, or many hereafter be constructed, at the expense of the state, by which a greater quantity of water may be introduced than is required for the purposes of navigation, thereby creating *valuable hydraulic privileges*, either on said feeder or on the canal receiving water therefrom; and where the introduction of such additional quantity of water will injure mills or mill sites on such stream, between the point where the water is to be taken out and the point at which it is to be returned into such stream; the canal commissioners shall be

> authorized to purchase for, and on behalf of the state, any such mill or mill site so liable to be injured, or the right to take from such stream such additional quantity of water, as either may be deemed best for the interest of the state; provided, the sum to be paid for such mill, mill site or privilege, shall in no case exceed two-thirds of the sum for which the commissioners shall have ascertained the hydraulic privileges, to be supplied by such additional quantity of water, can be sold; *or said commissioners may, at their option, convey to any owners of any mill or mill site, so liable to be injured as aforesaid, a part of the water power to be created as aforesaid, as a compensation for the damages sustained by the taking of such additional quantity of water from such stream.*"

The first of these two Acts authorized the canal commissioners to dispose of the water power in *perpetuity* "for a certain annual rental *or otherwise*"; the second authorized them to "*convey*" the water to owners of mill sites as compensation for damages resulting to mill sites and water power by reason of the construction of the canal and feeder. Minor's mill was located between the point on the river "where the water was (is) to be taken out and the point at which it was (is) to be returned to such stream," the latter at Toledo. By the construction of the canal and feeder and the state's dam, with which Minor's mill race and dam were replaced, a greater quantity of water was introduced into the canal than was "required for the purpose of navigation"; and Minor's mill site having been not only injured but destroyed as the result, the canal commissioners conformably with the latter Act conveyed to him the part of the water power "created as aforesaid," and conformably

with the former Act conveyed it in perpetuity, subject only to the necessities of navigation. The latter, however, was the one and only condition to which his water power was subject, and by the terms of the statute itself (Act of February 18, 1830) as well as the terms of the state's grant to him the state might interfere with or curtail his water power *for the purposes of navigation only*. And of course the proposed abandonment of the canal and the consequent destruction of the water power are not in furtherance of navigation or of anything remotely connected with navigation.

Again, no decisions have been referred to or cited denying the validity of a water power in perpetuity, or upholding, in an action for injunction, the right of the legislature to destroy such a water power or declare it void by an abandonment Act such as the one of 1927. On this point it was argued in the *Middletown Hydraulic* case that the effect of upholding Enoch's water power in perpetuity was to require the state's maintenance of the canal system for a like period co-extensive with such a grant. As said by His Honor, Judge Jones, in the dissenting opinion, page 463:

> "Under the authorities heretofore and hereafter cited, I am unable to bring myself in accord with the connotation in the syllabus that the canal commissioners could accept a grant of land for canal purposes upon which any burden by way of upkeep and maintenance in favor of the grantor could be imposed. If this be the character of Enoch's grant, then, quoting from the opinion of Chief Justice Johnson in *State ex rel. Fanger vs. Board of Public Works*, 42 Ohio St. 607, 615:
>
> 'The state would be compelled to maintain her canals at any sacrifice for the exclusive benefit of

the lessees of surplus water, or become the purchaser of the property of the lessee, thus making the incidental purpose paramount to the public use.'"

The majority of the court held otherwise, however, and on this point the court in *Maumee Valley Electric Co. vs. Toledo, supra*, say (pp. 101-102):

"Broadly stated, the city's defense is this: * * * (d) The state had no right, after abandonment for navigation purposes, to maintain the canal at public expense for commercially supplying water for hydraulic purposes and thus could not be required to do so; * * *. In the view we take of the instant case, it is unnecessary to decide whether the general proposition of law stated in paragraph (d) above applies under the special conditions existing here, including the Law lease and the agreement supplemental thereto, the fact that public navigation of the canal level in question had already ceased before 1910, that for many years by virtue of the Law lease and supplemental agreement, the state had been and was still being relieved of all expense and upkeep of the canal, that the use of water for hydraulic purposes did not interfere with navigation, and that by the supplemental agreement the state expressly sold and leased to plaintiff 'all the increased water passing through' plaintiff's weir. We find it unnecessary to say more in that regard than that the case of *State vs. Middletown Hydraulic Co.*, 151 N. E. 653, decided by the Supreme Court of Ohio since the argument of the instant case in this court seems to lend substantial support to the proposition that *the state had power to continue to keep up the canal and to carry out its existing contracts with plaintiff*, under the special and peculiar conditions prevailing, notwithstanding the abandonment of the canal for navigation purposes."

Notwithstanding the foregoing, the appellee in the present case is not asking that the state be *required* to *maintain* the water power, but merely to refrain from destroying it by converting the canal property to the uses of the municipalities. The dam at Providence is a permanent concrete structure, and the length of the canal from the dam to the appellee's mill is too short to require serious consideration in respect of its upkeep. Not only that, but as heretofore seen, the state is relieved of all expense of upkeep, and the Minor grant requires him and his successors to erect, complete and keep in good repair the regulating weir adjacent to the mill, to keep the head races in good repair and the canal clear of obstructions, so that there is no obligation of upkeep or repair on the part of the state in this case notwithstanding the decision in the *Middletown Hydraulic* case imports such an obligation.

As a corollary of the contention that the state could not grant a valid water power in perpetuity, it was argued in the *Middletown Hydraulic* case that inasmuch as the state in acquiring its canal lands, was without authority to accept anything short of a fee simple estate, therefore when the state acquired Enoch's mill property, the water power reserved to him was necessarily void. This point is insisted upon in the dissenting opinion at pages 462 and 463. In holding to the contrary, however, the court said:

> "There is no provision in the Act (23 Ohio Laws 57) expressly prohibiting the canal commissioners from taking less than a fee simple * * *. This court has not yet passed upon the right of the canal commissioners by a grant to take less than a fee simple."

That the state's title might lawfully be something less than one in fee simple is strongly implied, however, in *Corwin vs. Corwin*, 12 O. St. 629, and *Voight vs. Railway Company*, 58 O. St. 123, wherein the state's title to canal lands was twice held to be a mere easement.

(5) Entirely Apart From the Decision of the Ohio Supreme Court in State ex rel. vs. Middletown, Etc. Co., Supra, No Case Has Been Cited Sustaining the Right of the State to Abrogate by Legislative Enactment a Water Power Grant Such as the One in the Case at Bar. The Proposition That the State, by the Enactment of a Canal Abandonment Act Whereby All Water Power Rights Theretofore Granted Are Declared Void, May Extinguish Water Power Rights Such as Those of the Appellee, Is Unsupported by Any Decision Upon Which the State Relies.

In considering the situation presented by the case at bar the court will not overlook the fact that here the appellee is not a *lessee* of surplus water seeking *damages* against some individual or corporation in whose favor the state has abandoned a portion of its canal property. On the contrary, appellee brings this action as the grantee of an absolute water power right in fee simple, to enjoin the state's officers from enforcing the Abandonment Act of 1927 which undertakes, among other things, to declare the appellee's grant void in so many words. None of the cases relied upon by the state even remotely support the proposition that the state, having appropriated the water power rights of an individual and having, by grant, revested him with those rights and

recognized their validity for more than eighty years, may now declare the grant void, ostensibly in order to devote the canal lands to the purposes of Lucas County and the municipalities along the line of the canal. This is an action in equity. That the state was morally bound to protect—that it should in all good conscience have protected—appellee's rights is settled by the decision in *Maumee Valley Electric Co. vs. Toledo, supra,* and the question here presented is not whether under the Abandonment Act of 1927 the appellee is entitled to damages from the county or the municipalities, but rather whether the state as "a commercial proprietor, engaged in the operation of a great power plant," is not bound by its grants in the same manner and to the same extent as an individual. That none of the cases relied upon by the state are decisive of that question is apparent from the following analysis, in addition to the analysis appearing in the opinion in *Maumee Valley Electric Co. vs. Toledo, supra*:

In *Hubbard vs. City of Toledo, supra,* which was an action for damages and not for an injunction, the question determined was whether or not the Abandonment Act in question there was intended to protect the rights of two classes of lessees or only one, *viz.*, the "lessees of public works" *and* the lessees of surpus water, or the "lessees of public works" *only*, they constituting two entirely separate classes of rights at that time; in short, the case turned on the question of legislative intent, the court holding that the legislature intended to protect and had protected the first class of rights, *i. e.*, those of the lessees of public works, but not the second, *i. e.*, the water rights of the plaintiff Hubbard, pointing out that in the

leases of surplus water not only was there no agreement on the state's part to furnish *any* water but, on the contrary, the state had reserved *the right to terminate the leases and resume the water at any time*—and therefore the lessees possessed no *rights* capable of enforcement. In the present case, however, the state's conveyance was of a definite amount of water, with no right reserved in the state either to terminate the grant or resume the water; so that neither in point of fact or law are the two cases alike or even similar.

Nor will it be forgotten that the abandonment of the sections of canal in issue in the *Hubbard* and other cases relied upon by the state *were coincident with the discontinuance of navigation* on those sections. In the *Hubbard* case the abandonment took place in 1864, and in *Fox vs. Cincinnati, supra; Elevator Co. vs. Cincinnati*, 30 O. S. 629, and *Cincinnati vs. Rogers* (16 Ohio App. Rep. 139) in 1863. On the sections of canal involved in the case at bar and in the *Middletown Hydraulic* case, however, navigation had ceased at least thirty years ago, and ever since then the state has retained the canal property for hydraulic purposes. In such a state of facts it was inevitable for the court in the *Middletown* case to have determined that the state, by its own acts, has become and is now to be regarded as the proprietor of a large and valuable water power.

In *Elevator Co. vs. Cincinnati, supra*, the state had leased the canal to the city by virtue of the Act of March 24, 1863 (60 O. L., p. 44). Subsequently, in 1869, the state leased the water power to the appellee at a point on the part of the canal so leased. The action was to recover damages at law by the owners of the water power

lease, and all that the court held was that the reservations and conditions annexed to the state's grant to the city were not intended to reserve to the state, after title to the canal had vested in the city and the latter was engaged in making improvements according to a plan approved by the state, the right to create *new* water rights "not theretofore existing." The case is in no sense an authority in support of the state's position in the case at bar.

The case of *Fox vs. Cincinnati*, 33 O. S. 492; 104 U. S. 783, furnishes even less support to the state's position. It was also one at law arising under the Act of March 24, 1863, involved in *Elevator Co. vs. Cincinnati, supra*. The appellee's mill had burned down many years before the action was commenced; he had paid no rent under his lease; the canal lock at his mill site had been permitted to become out of repair and the water allowed to seep away, the condition being such that the state might have declared a forfeiture of the lease had it not already been forfeited by abandonment. And all that the court held was that under such circumstances there was no obligation on the part of the city to protect the appellee or respond to him in damages.

The most that can be said for those cases, is that the right of the state to retain the canals for water power purposes after their abandonment for navigation is there doubted. But none of those cases involved that question directly, and so the doubt remained until the decision in the *Middletown Hydraulic* case wherein the court settles the doubt once and for all in favor of the state's right and duty to deal with its water power as an individual.

And in *Maumee Valley Electric Co. vs. Toledo, supra,* the Court of Appeals so construed that case.

The case of *Cincinnati vs. Rogers, supra,* also an action for damages, involved a claim against the City of Cincinnati by lessees of water, not along the part of the canal abandoned in that case, but *along the aqueduct* east and south of the abandoned portion of the canal. All leases for water along the canal had expired, and all that the court determined was that under the terms of the Abandonment Act the lessees of water along the aqueduct were not entitled to damages against the city.

(6) Appellee Has No Adequate Remedy at Law.

The abandonment laws of 1927, 112 Ohio Laws 360, contain no provisions for compensating the appellee and other users of water for the loss occasioned them by the abandonment of the canal. Section 4 of that Act bluntly declares all leases heretofore granted for hydraulic purposes on that part of the canal to be null and void. Whether the agreement of September 1, 1842, between Minor and the state be construed as a sale or as a lease, the situation is the same, because nowhere in the Act is there any provision for compensation to either class, lessees or grantees. Nor is there any such provision for compensation in any other statute of the state, and inasmuch as appellee cannot sue the State of Ohio, nor is there any tribunal through or by which its claim could be considered and paid, it follows as a necessary consequence that the appellee is wholly without remedy at law, adequate or otherwise.

Nor do we think it will be seriously claimed that

compensation can be assessed to the appellee under the Act of February 4, 1825 (23 Ohio Laws 50), Section 8 of which applies to compensation for property taken for canal purposes. Minor's property was appropriated more than eighty-five years ago. It involved a dam, mill race, mill site, water power and other property. As compensation for all of it (except the mill proper) he was granted the water power in issue here, and there certainly is no authority under that Act to take away and destroy the compensation so paid, substituting for it some new compensation neither provided for in that Act nor in any other statute of the state. If the state claims that compensation can be now assessed and paid, we respectfully ask for a citation to the statute or provision to that effect. Certainly it is not in the Act of 1927—nor in the Act of February 4, 1825. Were Minor's water power now to be appropriated by the state for *canal purposes*, undoubtedly Section 8 of the Act in question (23 O. L. 50), providing as it does for compensation in such cases, might afford him an adequate remedy at law. Here, however, his water power is not being taken for canal purposes, but is being destroyed in the interest of the municipalities. Certainly such a taking in this year of grace 1928 can not even remotely relate to the building of the canal in 1842, nor can it, by some process of retroaction, be referred back to the Act of 1825, which refers only to compensation for property taken in canal construction, and not to compensation for property attempted to be wiped out in canal destruction.

And quite apart from the foregoing considerations, how, we respectfully ask, would or could this honorable court proceed in this case to a determination of the fair

value of appellee's water power? Would that value be based upon costs current as of 1825, or 1842, or 1928, and upon what basis would compensation be computed? The proposition is scarcely worth further consideration.

(7) The Abandonment Act of April 4, 1927, 112 Ohio Laws 360, Shows on Its Face That Its Enactment Was Not in Good Faith.

On this subject it will be first noted that after providing in Section 1 for the abandonment of the canal, Section 3 provides that the lands used and occupied by that part of the canal shall be forever held by the state in fee simple for the purpose of constructing thereon a highway at such times as the state *may hereafter* find convenient. The Act, so far from evidencing any present intention or need of the state to devote the canal bed to that purpose, distinctly belies any such need. This is followed by Section 4, containing, if appellant's contention is sound, the wholly unnecessary provision that all leases for canal or hydraulic purposes shall become null and void *on and after sixty days* from the taking effect of the Act. Up to this point, therefore, the Act attempts a wholly uncalled for, unnecessary thing, to-wit, the destruction of the water power and the cancellation of water leases prior to any need on the part of the state of the land for alleged highway purposes. Then follows the real motive behind the abandonment. By Section 7 the director of highways is to plat so much of the canal as is to be used for highway purposes and so much of it as may be leased for other purposes. *But until the state shall construct the highway*, all municipal corporations through which the proposed highway may (perhaps)

pass *are permitted to use* the canal lands *without compensation.* (Section 8.) Here is a water power granted to the appellee under which it has expended large amounts of money improving the state's property and constructing appellee's own plant, relying on the supposed good faith of the state. For the pretended reason that it is necessary for state highway purposes the legislature proposes to abandon the canal, and then, as an admission that it is not at all necessary for those purposes, the Abandonment Act provides that until the state constructs the highway the municipalities *may use the land gratis.* The Act shows that the proposal of the state to use the canal bed for highway purposes is really not contemplated and entirely apart from the question whether the state may abrogate its water power grants in order to permit a canal bed to be used by municipalities *free of charge*, it is respectfully submitted that here in this court of equity the Abandonment Act should be scrutinized from the standpoint of its lack of good faith, particularly in view of the fact that in 1925 (111 Ohio Laws 367) the legislature's then attempted abandonment of the canal provided compensation to the appellee and a reasonable price to be paid by the county to the state for the canal land. To have to pay for the land and for plaintiff's water power, however, was not to the liking of the county, as it is not to the city, and so we are now confronted with the spectacle of an Abandonment Act providing no compensation for the appellee and permitting the county and adjacent municipalities to use the canal gratis.

To permit the Act attacked here to be executed would amount simply to a turning of this property to

the use, occupation and benefit of the City of Toledo and the other municipalities and townships along the line. Such a course is forbidden by the contract clause and Section 1 of the Fourteenth Amendment to the Constitution.

Missouri Pacific Railway Co. vs. Neb., 164 U. S. 403; 41 L. Ed. 489.

(8) The Abandonment Act of April 4, 1927, 112 Ohio Laws 360, Directly Impairs the Obligation of the State's Contract With Minor, and, as Such, Deprives Appellee, as His Successor, of Its Property Without Compensation and Without Due Process of Law in Contravention of Section 10 of Article 1 of the Constitution of the United States and Section 1 of Article 14 of the Amendment to the Constitution of the United States.

If, as we confidently expect the court to hold, the grant from the state to Minor constitutes a valid and enforcible contract, it is axiomatic that the Abandonment Act of 1927 would, if put into operation by the appellant officers of the state, directly impair the obligation of that contract, particularly in view of the failure of the Act to provide for compensation and the absence of any other means whereby the appellee might receive compensation, whether at the hands of the appellants or otherwise.

In the *City of Walla Walla vs. Walla Walla Water Company*, 172 U. S. 1; 43 Law Ed. 341, wherein the City of Walla Walla was proceeding to construct a municipal water plant in violation of its agreement incorporated in

the franchise granted to a private water company, the first, second and fifth clauses of the syllabus are as follows:

> "(1) The impairment of a municipal contract for a water supply by establishing its own system of waterworks is not excluded from the constitutional provision against impairing the obligation of contracts, on the ground that the city makes the contract and takes the action which impairs it in its proprietary capacity, and not as an agency of the state.
>
> (2) The grant of a right to supply water to a municipality and its inhabitants through pipes and mains laid in the streets, upon condition of the performance of the service by the grantee, is the grant of a franchise vested in the state, in consideration of the performance of a public service, and, after performance by the grantee, is a contract, protected by the Federal Constitution against state legislation to impair it.
>
> (5) An injunction against the building of waterworks by a city in violation of a contract with a water company will not be denied on the ground of a complete and adequate remedy at law, as the damage by the breach would be great, and perhaps irreparable, and exceedingly difficult to ascertainment."

In this connection the court said:

> "We know of no case in which it has been held that an ordinance alleged to impair a prior contract with a gas or water company did not create a case under the Constitution and laws of the United States. Granting that, in respect to the two classes of cases above mentioned, responsibilities of a somewhat different character are imposed upon a municipality in the execution of its contracts, our attention has not been called to an authority where the application of the consti-

tutional provision as to the impairment of contracts has been made to turn upon the question whether the contract was executed by the city in its sovereign or proprietary capacity, provided the right to make such a contract was conferred by the charter."

Again the court said:

"The objection that a court of equity has no jurisdiction because the plaintiff has a complete and adequate remedy at law is equally untenable. * * * What the measure of such damage was would be exceedingly difficult of ascertainment and would depend largely upon the question whether the value of the plaintiff's plant was destroyed or merely impaired. It would be impossible to say what would be the damage incurred at any particular moment, since such damage might be more or less dependent upon whether the competition of the city should ultimately destroy, or only interfere with, the business of the plaintiff.

This court has repeatedly declared in affirmance of the generally accepted proposition that the remedy at law, in order to exclude a concurrent remedy at equity, must be as complete, as practical, and as efficient to the ends of justice and its prompt administration as the remedy in equity. *Boyce's Executors vs. Grundy*, 3 Pet. 210, 215 (7:655, 657); *Phoenix Mut. L. Ins. Co. vs. Bailey*, 13 Wall 616, 621 (20:501, 503); *Kilbourn vs. Sunderland*, 130 U. S. 505, 514 (32:1005, 1009); *Tyler vs. Savage*, 143 U. S. 79, 95 (36:82, 89)."

It will be noted that there the federal jurisdiction was sustained and the water company granted an injunction notwithstanding, as conceded by the court, it might ultimately have recovered against the city in an action for damages. The case at bar, however, presents

no such possibility, due to the fact that here the appellants in an action for damages would be the state, and it is settled that, without its consent, the state may not be sued in such an action.

Again, in *Terrace vs. Thompson*, 263 U. S. 197; 68 Law Ed. 255, the third clause of the syllabus is as follows:

> "3. Equitable jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the Federal Constitution whenever it is essential in order effectually to protect property rights and the rights of persons against injury otherwise irremediable."

At page 214 the court said:

> "Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the Federal Constitution wherever it is essential, in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable; and in such a case a person who, as an officer of the state, is clothed with the duty of enforcing its laws, and who threatens and is about to commence proceedings, either civil or criminal, to enforce such a law against parties affected, may be enjoined from such action by a federal court of equity." Citing a long list of cases.

In *Cavanaugh vs. Looney, Attorney General*, 248 U. S. 453; 63 Law Ed. 354, the first clause of the syllabus is as follows:

> "1. Individuals who, as officers of the state, are clothed with some duty with regard to the enforcement of the state laws, and who threaten and are about to commence proceedings either of a civil or criminal nature to enforce an unconstitu-

> tional Act violating the Federal Constitution, may be enjoined by a federal court of equity from such action."

There injunctive relief was sought against an Act of the Texas legislature empowering the regents of the state university to condemn lands for the purposes of the university campus, and while the injunction was denied, it was only upon the ground that the condemnation proceedings provided by the Act afforded an adequate remedy at law and an appeal ultimately to the federal Supreme Court in the event the state court should finally deny a federal right. In the case at bar, however, the adequate remedy at law is wholly lacking—there is no remedy at law at all—and the only remedy available to appellee is in equity.

In *Louisville & Interurban R. R. Co. vs. Greene, Auditor*, 244 U. S. 499; 61 Law Ed. 1280, the second clause of the syllabus is as follows:

> "State officers charged with the duty of enforcing the tax laws of the state may be enjoined by a federal court of equity from taking steps looking to the enforcement of state and local taxes upon the intangible property of a public service corporation, assessed under state authority, which are asserted to violate the Federal Constitution because of a discrimination in the valuation of the property upon which the taxes are based, arising out of systematic undervaluation of other taxable property, although the state laws under the sanction of which the officers assumed to act in making the assessment do not contemplate any unlawful discrimination."

Nor does the fact that the grant to Minor was made by the board of public works of the state instead of by

the state itself, by direct grant of the legislature, render the Abandonment Act of 1927 any less a state statute impairing the obligation of a state contract. In *Mobile Gas Co. vs. Patterson*, 290 Fed. 476, 483, the court said:

> "How, then, may we doubt that the power of the state may be restrained by a contract contained in the charter of the corporation, or how are we to distinguish between a contract contained in the charter of a corporation and a contract entered into by the state through a public board, which is expressly authorized to enter upon the same?
>
> The precise question, as we understand it, came before the Supreme Court of the United States in the case of *Bridge Proprietors vs. Hoboken Land & Improvement Co.*, 1 Wall. 116; 17 L. Ed. 571, where the legislature of the State of New Jersey had appointed a commission with powers to contract for the building of one bridge over each river, authorizing them to fix rates for tolls taken by the builders and grant them a right to these tolls for ninety-nine years. The Act also contained a provision that it should be unlawful for any person or persons to build any other bridge within the limits which were defined on each side of these bridges, and the question presented was whether the contract thus made by the commission under authority from the legislature was a contract of the state, which was protected against impairment by the provisions of the Constitution, and it was there held that it was entirely competent for the state to delegate its authority to contract to the bridge commissioners, and that the contract when entered into by them, became a contract of the state, and was protected against impairment by the constitutional provisions. This case was cited with approval in the case of *New Orleans Gas Co. vs. Louisiana Light Co.*, 115 U. S. 650; 6 Sup. Ct. 252; 29 L. Ed. 516, where it was declared:

> 'In *Bridge Proprietors vs. Hoboken Co.*, 1 Wall. (68 U. S.) 116; 17 L. Ed. 571, it was decided that a statute of New Jersey empowering certain commissioners to contract for the building of a bridge over the Hackensack River, and providing not only that the "said contract should be valid on the parties contracting as well as on the State of New Jersey," but that it should not be lawful "for any person or persons whatsoever to erect any other bridge over or across the said river for ninety-nine years," was a contract whose obligation could not be impaired by a law of the state.' "

Proceeding to discuss the same subject further, the court said:

> "The instances in which such contracts on behalf of the state have been entered into through commissions are not, however, confined to these cases. Mr. Justice Brown, in the case of *Walla Walla vs. Walla Walla Water Co.*, 172 U. S. 1, 9; 19 Sup. Ct. 77, 81 (43 L. Ed. 341), reviewed the earlier decisions and commented:
>
> 'It is true that in these cases the franchise was granted directly by the state legislature, but it is equally clear that such franchises may be bestowed upon corporations by the municipal authorities, provided the right to do so is given by their charters. State legislatures may not only exercise their sovereignty directly, but may delegate such portions of it to inferior legislative bodies as, in their judgment, is desirable for local purposes. As was said by the Supreme Court of Ohio in *State vs. Cincinnati Gas Light & Coke Co.*, 18 Ohio St., 262, 293: "And assuming that such a power" (granting franchises to establish gas works) "may be exercised directly, we are not disposed to doubt that it may also be exercised indirectly, through the agency of a municipal corporation clearly invested, for police purposes, with

the necessary authority." The case is directly in line with those above cited. See also *Wright vs. Nagle*, 101 U. S. 791; *Hamilton Gas Light & Coke Co. vs. Hamilton*, 146 U. S. 258, 266; *Bacon vs. Texas*, 163 U. S. 207, 216; *New Orleans Waterworks Co. vs. New Orleans*, 164 U. S. 471.' "

Finally, in *Cuyahoga River Power Co. vs. Akron*, 240 U. S. 462; 743 Law Ed. 743, the syllabus is as follows:

> "A federal District Court has jurisdiction without diversity of citizenship of a bill brought by a hydro-electric power company to prevent a municipality from appropriating the company's asserted paramount rights through the enforcement of an ordinance for the appropriation of the waters of a stream, where the bill, after setting out various passages from the state statutes and Constitution, and averring that the city has no constitutional power to take the company's property and franchises, or any property for a water supply, alleges that the city does not contemplate instituting proceedings against the company, but intends to take the latter's property and rights without compensation; that it is building a dam and has taken steps that will destroy the company's rights; that it is insolvent; that the purpose of the ordinance and statutes referred to is to appropriate and destroy those rights without compensation; and that in so acting it violates the contract and due process of law clauses of the Federal Constitution."

Inasmuch, however, as the jurisdiction of the court is not questioned, further citation of authorities would seem to be superfluous.

CONCLUSION

In conclusion, it is respectfully submitted that:

1. Under Section 8 of the Act of February 24, 1825, and the other Acts heretofore referred to, the canal commissioners had the right, in acquiring mill property for canal purposes, to reserve or confirm to the mill owner the right to use a part of the canal water for power purposes in perpetuity.

State ex rel. Crabbe vs. Middletown Hydraulic Co., *supra.*

2. The grant of property for canal purposes from a mill owner to the state, which reserved to the grantor such a water power in perpetuity, sustained in that case, is no different in principle from the taking by the state of the mill owner's property and the concurrent conveyance by the state of the water power to him and his heirs forever, present in the case at bar.

3. In such case the function of the state is that of a proprietor, and its conveyance of the water power is as valid and binding as though made by an individual.

4. Whether or not it is the duty of the state to insure the continued use of the water power by maintaining in good repair the dam and canal creating it, the state at least has no right to *destroy* the water power, whether by declaring its conveyance—its solemn contract—void, or by directing its officers to drain off the water, or by authorizing the county commissioners to drain it off and use the canal property for their own purposes.

5. Particularly is this so where the state retains the dam by which the water power is created.

6. No adjudicated case contravenes any of the foregoing propositions.

7. The conveyance of the water power to Minor, his heirs and assigns, was upon a valid, valuable consideration which the state, by the terms of the Abandonment Act of 1927, still retains.

8. There is no method by which compensation may be awarded the appellee, as Minor's successor, for its loss of the water power sought to be destroyed by the state.

9. Appellee is therefore without remedy at law.

10. The abandonment Act of 1927 impairs the obligation of the state's contract contained in the conveyance of September 1, 1842, in contravention of Section 10, Article I of the Constitution of the United States.

11. The Act attempts to deprive appellee of its property without due process of law, in contravention of Section 1 of Article XIV of the amendments to the Constitution of the United States and in contravention of Section 19 of Article I of the Constitution of Ohio.

12. In accordance with the principles of equity and fair dealing the decree should be affirmed.

Respectfully submitted,

U. G. Denman,
Karl E. Burr,
T. W. Christian,
Counsel for Appellee.

APPENDIX

(Amended Senate Bill No. 48.)

An Act

To abandon a portion of the Miami and Erie Canal in Lucas County, Ohio, and to devote the same to highway and other purposes and to repeal all Acts in conflict therewith.

Be it enacted by the General Assembly of the State of Ohio:

Sec. 14178. Portion of Miami and Erie Canal abandoned; description.

Section 1. That the portion of the Miami and Erie Canal in Lucas County, Ohio, that is described as follows be, and the same is hereby abandoned for both canal and hydraulic purposes: Commencing at a point just below the head of the Maumee side-cut near Maumee, Ohio, thence southwesterly over and along said Miami and Erie Canal, including the full width of the bed and banks thereof, as defined by Buchanan's survey, to a point where said canal joins with the Maumee River on the westerly side thereof, in Providence Township, Lucas County, Ohio.

Sec. 14178-1. State of Ohio reserves title to all lands and waters.

Section 2. The State of Ohio reserves unto itself, the title to all lands and waters to which it is entitled under the various Acts, providing for the construction of the Miami and Erie Canal and all lands now occupied by any part of the said Miami and Erie Canal, including all lands used for lock houses, waste ways or for other purposes and now the property of the State of Ohio.

Sec. 14178-2. Used and occupied lands to be held for the State of Ohio in fee simple.

Section 3. So much of said lands as were used and occupied by the Miami and Erie Canal shall be forever held for the State of Ohio in fee simple, and held by the state for the purpose of constructing upon the said lands, a highway, to be erected, constructed and improved at such time or times as the State of Ohio may hereafter, either by legislative enactment, or otherwise, find proper and convenient.

Sec. 14178-3. When existing leases shall become null and void.

Section 4. All leases heretofore granted to any person, firm or corporation, for canal or hydraulic purposes on that part of the Miami and Erie Canal described in Section 1 of this Act shall become and be null and void on and after sixty days from the taking effect of this Act, and all other leases for lands heretofore granted upon such portion of the canal shall be terminated according to the terms of this Act as the same can be legally done.

Sec. 14178-4. Abandoned portion shall be under supervision and control of state highway director.

Section 5. The abandoned portion of said canal shall be under the supervision and control of the state highway director, to be devoted to highway and park uses and purposes as herein provided, and the director of highways of the State of Ohio is hereby authorized to, and he shall, within sixty days from the taking effect of this Act, drain the water of said abandoned portion and prevent the water of the Maumee River from flowing into or through said abandoned part of said canal.

Sec. 14178-5. Surveys and maps to be made.

Section 6. As soon as practicable, after this Act goes into effect, the director of highways of the State of Ohio, shall cause surveys to be made of the canal property herein abandoned, together with maps and plats of the same, and of all lands used in connection with that portion of the Miami and Erie Canal, hereby abandoned, belonging to the State of Ohio, adjacent thereto, and file a copy thereof with the governor.

Sec. 14178-6. Making of plat or plan.

Section 7. The director of highways is further directed to make a plat or plan, showing the highway, its length, grades and width of so much of the canal property as may be used for such highway purposes, and all other lands adjacent thereto that may be leased for other purposes.

Sec. 14178-7. Use of lands before highway is constructed and improved.

Section 8. Until said highway shall be constructed and improved, no portion of the lands within the plat or plan showing such highway shall be leased for any purpose whatever, but until the State of Ohio shall construct and improve said lands for a highway, all municipal corporations through which said highway shall pass when completed, and the commissioners of Lucas County, Ohio, shall be permitted to use said canal lands for public purposes only, without compensation.

Sec. 14178-8. Leasing of adjacent lands; manner.

Section 9. All other lands which may be shown on said plat adjacent to said highway and which will not be used for highway purposes may be leased under the direction of the director of highways, in the following manner:

The said director of highways shall cause said lands, not to be used for said highways, to be appraised and a report of said appraisement filed in the office of the governor and one copy left in the office of the director of highways.

After said lands are so appraised, and upon application therefor, the lands not needed or required within said highway may be leased to any applicant, for a period not to exceed fifteen years, and with the right of renewal for an additional fifteen years, upon a rental equal to six per cent per annum upon the value of the appraisement so made, and at the end of fifteen years, said lands shall be reappraised and likewise leased to such applicant.

Provided, however, that if any municipal corporation, Lucas County, township, or other taxing district desires to lease any portion of said lands not required for said highway purposes, the same shall be leased to such taxing district upon a rental of four per cent per annum.

Said application shall be made in writing, upon forms provided for that purpose, and shall clearly describe the lands covered in said application, and shall state the term of years for which such lease is desired, and shall be signed by a public officer, duly authorized by the public authorities of the city, village, or other political subdivision making said application, and when the same shall be desired by any political subdivision.

Before granting any lease to any private individual, notice of the filing of such application shall be given to the public official of any municipal corporation, county,

township, or other political subdivision in which said lands are located.

If, within thirty (30) days after such notice such officer of the political subdivision makes no application to lease said lands, the same may be leased to private persons, firms or corporations, and such application made by such private persons, firm or corporation shall be made in writing upon forms provided for that purpose, describing the lands covered in the application, the term of years for which the lease is desired, and be signed by such person, firm or corporation, and filed in the office of the director of highways of the State of Ohio.

In the event that any leases granted herein are renewed at the expiration thereof, the same shall provide for a reappraisement by proper state authorities, upon the expiration of each fifteen-year period, and the rate of rental upon such new appraisement shall be made in the same manner as the original appraisement.

Sec. 1417 8-9. Right to remove bridges, to grade and construct roads and streets.

Section 10. The county commissioners of Lucas County, the council or other legislative body of any municipality or township through which said abandoned canal passes, shall have, and are hereby granted, the right to remove all existing bridges, crossing said abandoned portion of said canal over which county roads, city or village streets or township roads pass, and to grade and to construct such roads and streets across the channel of said abandoned portion by necessary fills and grades in the channel thereof and to such grade as shall be approved by the director of highways, and the county commissioners of Lucas County are authorized to drain

the water of said abandoned portion, and to prevent the water from the river from flowing into or through said abandoned part of said canal, but reserving all rights of the State of Ohio across said roadways for any and all purposes said state or its grantees may hereafter desire to use said roadway, not in conflict therewith.

Sec. 14178-10. Sale prohibited; exception.

Section 11. No portion of the canal lands and lands adjacent thereto and herein abandoned shall ever be sold, except by specific authority of the General Assembly of Ohio.

Sec. 14178-11. Defining term highway director.

Section 12. The term highway director, as used herein, shall be construed to mean any officer, commission, board or department that may be established by law for the control of public highways.

Sec. 14178-12. Repealing section.

Section 13. That all Acts or parts of Acts in conflict with this Act be, and the same are hereby repealed.

O. C. Gray,
Speaker of the House of Representatives.
Earl D. Bloom,
President of the Senate.

Passed April 4, 1927.

Senate—

Passed, notwithstanding the objections of the governor, May 10, 1927.

Earl D. Bloom,
President of the Senate.

House of Representatives—

Passed, notwithstanding the objections of the governor, May 11, 1927.

O. C. Gray,
Speaker of the House of Representatives.

The sectional numbers on the margin hereof are designated as provided by law.

Edward C. Turner,
Attorney General.

Filed in the office of the secretary of state at Columbus, Ohio, on the twelfth day of May, A. D. 1927.

Clarence J. Brown,
131B. Secretary of State.

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IN THE

Supreme Court of the United States

Harry J. Kirk, et al.,
Appellants,
vs.
The Maumee Valley Electric Company,
Appellee.

No. 674.
October Term,
1928.

Harry J. Kirk, et al.,
Appellants,
vs.
The Providence Mill Company,
Appellee.

No. 675.
October Term,
1928.

On Appeal from the District Court of the United States, Southern District of Ohio, Eastern Division.

MEMORANDUM IN REPLY ON BEHALF OF HARRY J. KIRK, AS SUPERINTENDENT OF PUBLIC WORKS AND DIRECTOR OF HIGHWAYS AND PUBLIC WORKS OF THE STATE OF OHIO.

Under leave granted at the argument herein, this reply memorandum is submitted.

A.

CANAL LEASES IN OHIO GIVE LESSEES AS MATTER OF FACT NO ABSOLUTE RIGHT TO WATER; THEY WERE AND ARE MERE PRIVILEGES TO TAKE SURPLUS WATER FROM THE CANALS; CANAL ABANDONMENT, THEREFORE, WORKS NO BREACH OF ANY OBLIGATION OF THE STATE AND CONSEQUENTLY CANAL ABANDONMENT AS A MATTER OF CONTRACT LAW GIVES NO RIGHT TO COMPENSATION TO THE LESSEES.

Despite the compendiousness of opponents' "brief", the question at issue is simply this: Can the state of Ohio, by act of its legislature, abandon part of its canals without payment of compensation to those holding leases thereon for canal water? The question is identical with the question before the Supreme Court in Fox v. Cincinnati, 104 U. S., 783. Chief Justice Waite, speaking for the court, stated the question thus (p. 785):

> "The single question we have to consider is whether there is anything in the lease under which Fox claims which prevents the state from making such an abandonment, without compensation to him."

The gist of the court's decision, reviewing the status of canal water leases under Ohio statutes, is then given as follows:

> "The use of the water for hydraulic purposes is but an incident to the principal object for which the

canal was built, to wit, navigation. The large expenditures of the state were to furnish, not water-power, but a navigable highway for the transportation of persons and property. The authority of the board of public works to contract in respect to power was expressly confined to such water as remained after the wants of navigation had been supplied; and it never could have been intended in this way to impose on the state an obligation to keep up the canal, no matter what the cost, for the sole purpose of meeting the requirements of its water leases. There was certainly no duty resting on the state to maintain the canal for navigation any longer than the public necessities seem to require. When it was no longer needed, it might be abandoned; and, if abandoned, the water might be withdrawn altogether. Provision was made for resuming the water and stopping the supply, if the canal was kept up for navigation; but no such provision was necessary in respect to the abandonment of the whole work, because the right to abandon followed necessarily from the right to build. If the water was resumed while navigation was maintained, no matter how injuriously it affected lessees, all that could be asked of the state was to forego the further collection of rents, or refund a reasonable proportion of such as had been paid in advance. The entire abandonment of the canal could not create any different liability. Every lessee of power took his lease and put up his improvements with full notice of the reserved right of the state to discontinue its canal and stop his supply of water.

This is in accordance with repeated decisions, both in Ohio and other states, and seems to us fully sustained on principle and authority. Hubbard v. City of Toledo, 21 Ohio St., 379." (And other cases.)

See also:

Walsh v. Columbus Ry., 179 U. S., 469.

Opponents contend that the principles of law and the facts in relation to the subject matter here involved have changed since the authoritative decisions by the Supreme Court of Ohio in Hubbard v. Toledo and of the Supreme Court of the United States in Fox v. Cincinnati. The claim is that Ohio, in relation to canal leases, has lately been acting in a proprietary or private capacity and, though opponents' legal philosophy is not clearly disclosed, the conclusion is reached that therefore the canals cannot now be abandoned without payment of compensation to the water lessees; and opponents led the court below into this error (Maumee Rec., p. 175). This argument proceeds on a misconception of the legal principles underlying the lines of authorities started in Fox v. Cincinnati and Hubbard v. Toledo. Those decisions are not bottomed on the principles of state sovereignty but on the simple principles of contract law. The reason the state of Ohio can abandon the canals without compensation to the water lessees is not because, as an exercise of sovereignty, it can with impunity break its contract, but because it made no contract to deliver water, as such. The interpretation put on these water leases by the Supreme Courts of Ohio and the United States, basing the interpretation upon the language used in the leases and upon the state law under which they were authorized to be made by the board of public works, was that they were not contracts absolute to deliver water, but were merely contracts giving the lessees or privilegees the right to take surplus canal water and imposing no obligation upon the state to have surplus or to continue a canal.

To establish the correctness of this analysis, it is only necessary to look at the language of the decisions. In Fox v. Cincinnati, at page 785, the court says:

> "It never could have been intended in this way to impose on the state an obligation to keep up the canal, no matter what the cost, for the sole purpose of meeting the requirements of its water leases."

And, in the decision of Hubbard v. Toledo, at page 396:

> "True, the period stipulated for the duration of their lease has not expired; but the instrument or lease was a mere license for them to take, not an obligation on the part of the state to furnish. They were authorized to withdraw and use the 'surplus water' which might be incident to the operation of the canal, but the state was not bound to create such surplus. Their lease contained no covenant to repair or stipulation to maintain or obligation to operate the canal, nor any agreement to supply power to the plaintiff's mill."

All this is the language of the law of contracts. The basic theory is not that because the state is sovereign and not a proprietor, it therefore can with impunity break its contract. The legal philosophy is that the state has never made a contract to supply water, as such. The whole effect of the sovereign aspect is merely to aid the court in construing the nature of the contract entered into. It is because the state in its sovereign right might want to change the use of the canals to another use and thus abandon the canals that the contracts must have been made by the parties as, and were construed by the parties to be, mere privileges to take canal water. If no canal, no water. If no surplus, no obligation to deliver.

The water leases in the case at bar contain the same provisions in fact and were made under the same statutory authority, to wit, the act of 1840, as were the water leases before the courts in the Fox and Hubbard lines of cases. There were the same provisions (Maumee Rec., p. 69) for "surplus water", the same reference to "canal water"—the same provision for the "right of resumption"—the same reference to the rights of the water lessees being "privileges". Note (Maumee Rec., p. 69.) "All the surplus water of the Miami and Erie canal between Providence and Toledo not needed for navigation or not now under lease"; and again (p. 71), "The party of the first part (state) reserves the right to resume at any time the use of the water hereby leased whenever the same shall become necessary for the purpose of navigation", etc. And again (Rec., p. 71), "Destroying the value of the privilege"; (Rec., p. 73) "the rights and privileges hereby granted." And further, it is not disputed, and was in fact so found by the lower court (Maumee Rec., p. 175) that the whole authority to make these leases by the board of public works was derived from the act of 1840 (our Maumee brief, p. 69), which contained the provisions (Section 20) that "whenever in the opinion of the board of public works there shall be surplus water in either of the canals"; again (Section 22), "no hydraulic power or right to the use of any water shall be so leased or conveyed except such as shall accrue from the surplus water of the canal"; also (Section 23), "every lease * * * shall contain a reservation and condition that the state or its authorized agents may, at any time,

resume the privilege or right to the use of the water", etc. The effect of these statutory provisions on the power of the state officials to grant rights was, of course, in the minds of the courts in the Hubbard case, p. 396, and the Fox case, p. 784, in determining the interpretation and effect of the water leases.

In view of the foregoing, is not the statement, which is the **ratio** of the opinion below, that "the leases and grants owned by the plaintiff are subject to a present-day construction and interpretation in relation to the surrounding facts and circumstances in harmony with the present relationship of the parties" obvious error? That which is by its plain terms a **privilege** to take surplus canal water granted by an officer of the state, who by law had authority to do no more, cannot be stepped up as a matter of "present-day construction" into an **absolute agreement to deliver water at all events**. The question now as in 1881 is,—what **is** the agreement of the state and what authority **did** the state official have? The answer is that the agreements made in the case at bar were the same as the agreements made in the Hubbard and Fox cases, to wit, agreements to give water lessees the privilege of taking surplus canal water. If there be no canal or no surplus, then there is no water. A "present-day construction" of the same contract cannot increase the obligations of the contract, nor augment the power of the official acting for the state.

B.

STATE VS. MIDDLETOWN HYDRAULIC CO., 114 O. S., 439, REPRESENTS NO DEPARTURE IN OHIO LAW FROM THE PRINCIPLES ESTABLISHED IN HUBBARD VS. TOLEDO, 21 OHIO ST., 379, AND ITS SUCCEEDING CASES.

Opponents' chief reliance is upon State v. Middletown Hydraulic Co., 114 O. S., 439, as showing that the foundation rule in Ohio established in the Hubbard line of cases has changed. And the vital error in the decision appealed from arises from the lower court turning a fugitive dictum in the Middletown case, to the effect "that the position of the state has changed from that of operating the canal as a navigable highway to the operation of a great power plant," into the ratio of its decision. The Middletown decision is not based on any interpretation or consideration of the effect of a lease from the state of Ohio to any water lessee. There was no lease. The question in the Middletown case was not what a water lessee got but what the state of Ohio got by reason of a grant from one Enoch, who was originally occupying a water power site and made a grant to the state. It is inconceivable that the Middletown case overruled the Hubbard decision. The Hubbard and Fox line of cases were not even mentioned in the majority opinion of the court. Certainly the Supreme Court of Ohio has not changed a rule established in the Hubbard case in 21

O. S., and thereafter adhered to in Elevator Co. v. Cincinnati, 30 O. S., 629; Fox v. Cincinnati, 33 O. S., 492; State v. Board of Public Works, 42 O. S., 607, and Voight v. Railroad Company, 58 O. S., 123, without even referring to those cases. The reading of the syllabus, which under principles of Ohio law contains the **decision** of the court, discloses no mention of the Hubbard and kindred cases. Further, no abandonment act of the legislature was involved in the Middletown case.

The question at issue in that case and the point of difference between the majority and the minority opinions was not what were the rights of a lessee under a canal lease from the state, but whether the state of Ohio itself **could** under 23 O. L., 57 (the act of 1828), take less than a fee simple title when it occupied a parcel of land for canal purposes, even though in the grant to the state there was a reservation by the grantor of pre-existing water rights.

The Middletown case, as a decision, leaves the Hubbard decision untouched.

C.

THE OBITER OF THE MIDDLETOWN HYDRAULIC CASE CONSIDERED.

If the law of Ohio in reference to the rights of canal water lessees made under authority of the act of 1840 is to be changed from the rule of the Hubbard and the Fox cases, it will not be by the decision in the Middletown case but by an affirmance in this court of the er-

roneous decision below. That decision followed the above quoted obiter at page 448 in the Middletown case, and this obiter is repeated throughout opponents' briefs in this court. In reply we contend:

1. Non-use of the canal by the public for navigation purposes does not constitute an abandonment of the canals by the state. Only an owner can abandon property or change its use.

Adams v. Hodgkins, 109 Me., 361.

Opponents contend that when the last boat stopped, the state ceased to be sovereign with respect to its canal property. Here is the fallacy. The property still remained canal property, even though the public did not use it as such. It remained devoted by the state to a public use until the state, by act of its legislature, changed the use, and this, with reference to the particular section of the canal in question, was not 1895, but in 1927, when the act of abandonment here in question was passed. This act of the state with reference to the abandonment of this particular section harmonizes with the policy pursued throughout the canal history, starting with the original abandonment act of 1861, which act abandoned part of the canal in Toledo and came before the courts in Hubbard v. Toledo, 21 Ohio St., 379, and the abandonment act of 1863, reviewed in the case of Fox v. Cincinnati, 104 U. S., 783.

2. Even if it were a fact, which it is not (Point 4, post), that the leases in question were made after cessation of navigation by the public, those leases were in the

same language as always and, therefore, as a matter of contract law, whatever the state's status,—sovereign or proprietary—impose the same obligation upon the state as theretofore, to wit, merely the obligation to give the privilege to take surplus water out of the canals. See Point A, supra. Further, those leases were granted under the same authority as theretofore, to wit, the act of 1840. Non-use for navigation purposes by the public could not increase the authority of the board of public works under that act.

3. There is no question that the state can and does, in certain situations, act in a proprietary capacity. How did the state act in relation to the particular leases in question? That is conclusively shown by the provisions of the act of 1840—the state, through the board of public works, was acting in its governmental capacity in granting leases of surplus water out of its public canals in substantially the same language, with the same power of resumption as always.

4. Opponents, straining to get in under the loose obiter in the Middletown case, try throughout their brief to create an impression that at the time their leases were made navigation had ceased. At page 105 they say: "and when appellee acquired its first lease, the Law lease, navigation had wholly disappeared."

If we are correct in points A, C1, C2 or C3, supra, the cessation of navigation, even if it were a fact, would be immaterial.

However, meeting the fact issue of cessation of navigation, because it was part of the basis of error below,

we contend that navigation had not ceased before acquisition of opponents' foundation lease in 1895. In substantiation of this, we say:

(a) The lease itself (Maumee Rec., p. 68) clearly indicates that navigation was still going forward; (Rec., p. 69) "surplus water * * * not needed for navigation"; (p. 71) "Whenever the same (water) shall become necessary for the purposes of navigation", etc.

(b) Further, the supplementary Law lease in 1910 (Rec., pp. 24, 25) grants rights "all consistent with the rights of navigation upon said canal."

(c) Note also the act of 1902, frequently in other aspects relied upon by opponents and set out in their brief (p. 246), Section 1 of which is as follows:

> "Be it enacted by the general assembly of the state of Ohio:
>
> Section 1. That it is hereby declared as a settled policy of this state that the Miami and Erie canal, together with its water supply * * * reservoirs, dams, feeders and adjacent lands from Cincinnati to Toledo, shall be retained and maintained as a public canal."

Then follows Section 2, containing the provisions that all boats

> "built for use * * * shall be paid for by the state * * * if at any time in the future the policy of the state shall be changed by abandonment of either or both of said lines of canal * * *."

Certainly, therefore, in 1902, seven years after the Law lease was made, there is indicated by legislative act not only the existence of navigation, but a legislative pur-

pose not to abandon the canals, but on the contrary to encourage their use.

(d) Opponents blow to the bursting point an admission made by counsel representing the state of Ohio in the prior administration. The answer of the state admitted (Rec., p. 30) the allegations of the bill respecting navigation. The allegation admitted (Rec., pp. 3 and 4) was that "between the years 1894 and 1900 navigation on said canal entirely ceased as a business." Even the admission went only so far as to say that navigation had ceased "between the years 1894 and 1900." This was vague and did not fix the exact year. Present counsel for the state regard the admission as unfounded in fact, and therefore a motion to amend the state's answer denying the allegation with reference to navigation and setting up the true facts, is being filed contemporaneously with this brief. The present attorney general feels it is his duty to set out the true and exact facts with reference to navigation, supported by an affidavit of the superintendent of public works. But, whether that motion be allowed or not, there is enough in the present record, as above pointed out [(a), (b), (c)], and now before the court, on this immaterial issue of cessation of navigation, to demonstrate that navigation had not ceased in 1895.

In this connection it is interesting to note that opponents, in their brief at pp. 58 and 59, place great reliance on the act of 1902, the theme of their argument being that the Maumee Valley Electric Company made great improvements in their plant, relying upon the vitality of the canal system as disclosed by the legislative intent in

the act of 1902. Opponents cannot blow both hot and cold. The act of 1902 clearly discloses that there had been no abandonment of the canal system by the state, but, on the contrary, a legislative pronouncement of an intention to maintain the canal system. The success or failure of that legislative purpose is immaterial.

(e) If the motion to amend the state's answer be granted, it will be disclosed that navigation on the Miami and Erie canal in fact continued until at least the year 1918. The public records in the department of public works disclose that, far from navigation having "practically disappeared" by 1894, the actual tolls charged and received by the state on a tonnage basis for the transportation of freight on the Miami and Erie canal alone in 1894 were $24,733.98. A complete statement of tolls for succeeding years is as follows:

1895	$17,699.28	1907	4,515.62
1896	17,095.53	1908—Record missing	
1897	13,111.48	1909	2,750.43
1898	10,072.49	1910	2,260.71
1899	13,436.98	1911—No record available	
1900	14,259.45	1912	1,600.58
1901	12,860.15	1913	951.45
1902	10,467.05	1914	297.05
1903	5,419.62	1915—7½ mos.	1.09
1904	3,654.31	1916	6.15
1905	3,243.55	1917—No record available	
1906	4,037.55	1918	816.00

So we see from the above table that canal tolls were being received on the Miami and Erie canal even as late as 1918.

(f) The unworkability of the rule contended for by opponents must challenge attention. Whether the lease gives a privilege to take, or contracts for water absolute depends upon what? It depends, opponents say, upon whether the state's status was governmental or proprietary. When? At the time of the making of the lease—or at the time of adjudication? If at the time of making—how explain the decision of the court below in the Providence Mill case? There the parties' agreements were in 1842! Surely there was navigation then. The obiter in the Middletown case does not fit with the case. There the grant was made in 1825. Yet the court obiter dictum said the status of the state had changed from governmental to proprietary. When? It is not, from the language used, clear whether the obiter referred to 1825—which of course it could not because navigation was just beginning then—or to 1926 the year of the decision. If the Middletown obiter means that the interpretation of the contracts depends upon conditions at the particular time the interpretation thereof is before the court, then quite obviously an absurd and unworkable rule would be established which has never received sanction of the Supreme Court of Ohio by way of decision or of this court.

D.

THE DECISION IN MAUMEE VALLEY ELECTRIC COMPANY v. TOLEDO.

Opponents rely also upon **Maumee Valley Electric Company v. Toledo**, 13 Fed., 2nd, 98. In reply we point out (a) the state of Ohio was not a party and its rights, therefore, were not adjudicated; (a) we have no quarrel with the correctness of the legal decision in that case. It is predicated entirely on the language of the abandonment act of February, 1920, Section 7 of which expressly provided that if the city of Toledo accepted the grant, then Toledo should "pay the water lessees a fair compensation for the loss of the water to which they are entitled." There is no such provision in the abandonment act of May 11, 1927, now before this court. This act is entitled:

> "An act to abandon a portion of the Miami and Erie canal in Lucas county, Ohio, and to devote the same to highway and other purposes, and to repeal all acts in conflict therewith",

and, by Section 4, provides that all water leases "shall become and be null and void after sixty days." (Our Maumee brief, p. 74.)

It is interesting to note from the extensive review of the abandonment acts set forth in Maumee record (pp. 159 and 160), starting with the act of 1861, which was before the Supreme Court of Ohio in the Hubbard case, and the abandonment act of 1863, before the Supreme

Court of the United States, in the Fox case, that the abandonment act of February, 1920, was the only one contemplating any compensation to those who lost water privileges. Of course, the state legislature could, as a matter of grace, grant compensation, or, as a matter of liberality with another's money (Toledo) provide for compensation. But, as clearly indicated by Judge Knappen in that decision, there was no **obligation** on the state legislature so to do. Our only quarrel with the language of the court is not with the discussion of the law involved, but an implication on page 104 of the decision that there was a "moral obligation" to the water lessees. Was there even a moral obligation, in view of the decisions by the Ohio Supreme Court and the United States Supreme Court over a period of more than fifty years holding that water lessees got only a privilege to take surplus water and not an absolute contract for water as such. The explanation of the reference to "moral obligation" must be ascribed to the absence of any presentation of the state's point of view in the case before the court. However, all must admit that we are concerned here with legal, not moral, obligations—the discharge of those must be left to the law-making body in Ohio, to wit: the General Assembly.

(c) The act of 1920 related solely to Lineal Part I, that is, from Swan creek to Maumee Side Cut (Maumee Rec., p. 168), and, of course, therefore could give appellee no right with respect to Lineal Part II which is the subject matter of the present abandonment act. It is claimed by appellee (Maumee brief, pp. 168 to 191) that

the act of 1920 constituted a contract for the benefit of the appellee. It is true that the city of Toledo was, under the terms of the act, obligated to make payment to the appellee in case it turned off the water under the terms of the act. There was no assurance or commitment by the state as to a continuity of water and no surrender of any of the state's sovereign rights over the remaining portions of the canal not touched in that act. There being no commitment whatever in this respect, none can be raised by implication, since the rule is that grants by a sovereign state are construed most strictly against the grantee.

E.

PROVIDENCE MILL CASE, No. 675.

In so far as special reference need be made to the Providence Mill case, we submit in reply the following:

(a) The entire theory of the lower court,—predicated on the change of the state's status from governmental to proprietary because of non-use by the public for navigation,—certainly can have no application to the Providence Mill case where the agreements between the parties were made in the year 1842 (Providence Rec., page 337) when navigation was of course active.

(b) The gist of opponents' argument is that the state of Ohio acquired but a qualified fee under the Minor grant, thus opponents seek to bring the Providence case under the actual (not obiter) holding in the Middletown case. A complete answer to this position is found in the

language of the lease from the state to Minor. It should be noted that Minor took a lease from the state, which was not true of Enoch in the Middletown case. Enoch had existing water power never granted to the state, but expressly reserved in his deed (see 114 O. S., p. 444). In this case Minor's property had already been taken. The Minor lease (Providence Rec., 37) was in no sense a conveyance of anything from Minor to the state. It was the grant by the state of the right to surplus canal water as compensation for property already appropriated by the state. The lease plainly discloses that all of Minor's property interests therein described had already vested in the state and the lease of surplus canal water was a new thing **granted to him** and not a prior existing interest **reserved by him.** That is the essential difference. The new thing was the right to a definite amount of **surplus** water "except when otherwise necessary for the navigation of the canal." It should also be noted that the lease from the state to Minor was in 1842 and was executed on behalf of the state under authority of the act of 1840, which clearly limited the power of those acting on behalf of the state to granting qualified water privileges. To the same effect is the final allowance to Peter Minor (Rec., pp. 47, 48). To give the construction sought by opponents to the plain language of the instruments which passed between the state and Minor, would be to construe those instruments as granting rights beyond the power of the board of public works under the act of 1840. Even if it be admitted that the act of 1831 (Opponents' brief, p. 33) constituted the authority for

the Minor lease, yet its terms, when analyzed, are no broader than those of the act of 1840. Clearly the authority to grant a portion of the water power conferred by the act of 7831 is referable to the water power mentioned in the first portion of the act, which is "a greater quantity of water * * * than is required for the purposes of navigation."

Accordingly, the final adjustment of the state with Minor gave nothing more than a right to surplus canal water and, were these instruments susceptible of a broader construction, they would be unauthorized and void as beyond the statutory powers of the state administrative officials. **State, ex rel. v. Board of Public Works**, 42 O. S., 607. It follows that the discussion relative to the surplus water privileges of the Maumee Valley Electric Company is equally applicable to this case. It should be pointed out, however, that **Maumee Valley Electric Company v. Toledo**, 13 Fed. (2nd), 98, has no pertinency here, for the Providence Mill privilege is not upon the portion of the canal involved in the act of 1920.

CONCLUSION.

In conclusion we contend that despite the copious citation of authorities and extent of matter contained in opponent's voluminous brief, these cases fall within a very narrow compass. All that is necessary to decision are the instruments between the parties, the act of 1840, the Fox and Hubbard cases, the Middletown cases, and the abandonment act of 1927. When clearly focused, all

that is involved is the right of the state of Ohio to abandon for canal purposes and to now devote to highway purposes a sixteen mile section of one of its canals without making payment in damages to holders of water privileges affected thereby. The court has an intimation of the amount of payments that would be required from the estimates in this record that appellee's water rights in case No. 674 alone are valued at $400,000.00 (Record, page 165). Must Ohio withhold following the march of progress and forego its purpose to devote part of its own property to a new and modern use for the benefit of the public? Must Ohio also continue for another generation to divert part of its public water for the pecuniary profit of a private corporation? It would have to, if the settled rule of law with reference to the rights of those who have water privileges granted under the authority of the act of 1840 is to be changed. No constitutional question is here involved. No property of appellees is being taken, because as a matter of simple contract law the water lessees have mere privileges to take surplus canal water—no absolute contracts for water as such. The questions involved are the same today as in 1871 in Hubbard v. Toledo, in 1884 in Fox v. Cincinnati. Those cases are still the law in Ohio unimpaired by the obiter in the Middletown case, and emphatically call for the reversal of the judgment below, if not indeed a dismissal of the case for want of a federal question involved.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 674, October Term, 1928

Harry J. Kirk, as Superintendent of Public Works and Director of the Department of Highways and Public Works of the State of Ohio, et al.,

Appellants,

vs.

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Appellee.

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Harry J. Kirk, as Superintendent of Public Works and Director of the Department of Highways and Public Works of the State of Ohio, et al.,

Appellants,

vs.

The Providence Mill Company,

Appellee.

On Appeal from the District Court of the United States, Southern District of Ohio, Eastern Division

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BRIEF ON BEHALF OF APPELLEES IN ANSWER TO APPELLANTS' MEMORANDUM AND REPLY BRIEF

U. G. DENMAN, Toledo, Ohio,
KARL E. BURR, Columbus, Ohio,
Counsel for Appellees.

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BRIEF ON BEHALF OF APPELLEES IN ANSWER TO APPELLANTS' MEMORANDUM AND REPLY BRIEF

I

CASE NUMBER 674, OCTOBER TERM, 1928

A. Correction of Typographical Error in Our Principal Brief:

The words "Lineal Part 1" in the last paragraph on page 171 of our principal brief in the third line from the bottom of the page should be "Lineal Part 2."

B. The Syllabus Paragraphs of the Cases on Which Appellants Rely Apply Only to the Facts in Those Cases Respectively and Do Not Control the Instant Case, the Facts and Circumstances of Which Are Widely and Essentially Different From and in Sharp Contrast With the Facts in Any of Those Cases:

Notwithstanding the syllabus of a decision of the Supreme Court of Ohio declares the law of the state, it does so "with reference to the facts upon which it is predicated and must be read in view of the facts found in the case." (*B. & O. R. R. Co. vs. Badlic*, 112 O. S. 567.) It is therefore again submitted on behalf of appellee that the third clause of the syllabus in the *Middletown* case (114 O. S. 437), *when read in connection with the facts in that case*, wholly sustains the contention of appellee that the state, having abandoned the canal for navigation purposes, now maintains it in its private capacity, as the proprietor of a great hydraulic power, and that its contracts in respect of that power are to be measured by the rules applicable to private individuals. In that case the third defense of the Hydraulic Company's answer averred that the state, in the construction of the Miami and Erie Canal, was authorized to appropriate, and in fact did appropriate, only such waters from the Miami River as were necessary for the purposes of navigation in and along the canal; that, navigation on the canal having long since ceased, the state was not entitled to take water from the river for the purpose of providing hydraulic power to manufacturers and others, and that the state was without power under

any act of the legislature to own, operate or maintain a canal solely for the purpose of leasing water to others for power purposes. (Opinion of Robinson, J., 114 O. S., pp. 441. 442.)

On this subject the court said at page 457:

> "The third defense, that the state, having abandoned the purpose for which it acquired its Miami and Erie Canal water rights, is now without authority of law exercising those water rights for a wholly different purpose, is met by the two principles heretofore discussed:
>
> (1) That in its proprietary capacity, its property rights are the same as those of private proprietors.
>
> (2) That the specific purpose for which it acquired water rights does not limit it to the use of those rights for that purpose, unless it is expressly prohibited from using them for any other purpose, but the specific purpose for which they were acquired operates as a limitation of quantity and not of character of use."

Consistently with the foregoing the third clause of the syllabus is as follows:

> "3. Where water rights are granted for a specified use, or are excepted from a grant for a a specified use, in the absence of an expressed intention that that grant or the limitation are for no other use, the specification of the use will not be regarded as a limitation of the character of the use, but only as a limitation of the quantity of the use."

Read in connection with *the facts in the case* the foregoing clause of the syllabus seemingly settles at least one point beyond the possibility of contradiction, *viz.*, that navigation on the canal having long since

ceased, the status of the state in respect of its canal waters now under lease is that of a *proprietor*. There would seem to be no escape from that proposition. And if that be so, *i. e.*, if the status of the state is now that of a proprietor of a water power, then (a) the obligations of the state in respect of its proprietary water power contracts are as enforcible as those of an individual, and (b) appellants cannot prevail by taking refuge behind the alleged sovereign character in which the state constructed the canal in the first instance.

Nor will the rule of *stare decisis* apply where, as is now true, the conditions surrounding the *Hubbard* case and similar cases have so changed that hydraulic power has been substituted for navigation as the now paramount purpose of the canal. In *Faris vs. State*, 3 O. S. 159, 167, the rule is stated as follows:

> "While the rule of *stare decisis* is the great safety of rights subject to judicial decision, maxims and regulations fitted to a former state of society and government are not to be preserved and forced into an unnatural application, when and where the very conditions necessary to them when established, have long since passed away."

It is significant, also, that notwithstanding there had been no legislative abandonment of the portion of the canal involved in the *Middletown* case, the court nevertheless considered and treated the canal as having been abandoned for navigation by *non-user*. It seems rather anomalous to require legislative action as a condition of abandonment for navigation purposes when such abandonment in point of fact has existed for some thirty years last past. Naturally the superintendent of public works still holds office, because his office is created by

the State Constitution; naturally, also, there are duties of his office in respect of the remaining canals maintained for hydraulic purposes, *e. g.*, the collection of rentals, maintenance and upkeep of some sections, etc., etc. To declare, however, that in the face of the admitted facts in this case, that there has been no abandonment for navigation purposes and that there will be none until the legislature solemnly declares in favor of such abandonment is the equivalent of saying that it requires an act of the legislature to establish in point of law something already established in point of fact for more than a generation—which does not seem sound.

And, of course, there had been no legislative abandonment of the portion of the canal involved in the *Middletown* case up to the time of the decision in 114 O. S. 437. True, an effort has since been made to abandon it for both canal and hydraulic purposes (Act of April 21, 1927, 112 O. L., p. 388; brief on behalf of appellee, pp. 94, 95 and 236), but it is significant that notwithstanding the attempted abandonment no action has been brought to oust the Middletown Hydraulic Company from its use of the water power again assured to it by the decision in the second *Middletown* case (116 O. S. 26) wherein, on the merits, the court determined that "the defendant *has title as against the state* to the use of 19,463.50 cubic feet of water per minute in excess of 8,000 cubic feet per minute, to which the state has title * * *."

The first *Middletown* case, 114 O. S. 437, was decided March 23, 1926, and the second *Middletown* case, 116 O. S. 26, was decided February 15, 1927. Both of these cases therefore were decided, as indicated above, prior to the passage of any legislative act by the legis-

lature of Ohio abandoning the portion of the Miami and Erie Canal on which the water power in question in those two cases is located. The only abandonment act ever passed by that legislature is the act cited just above, passed April 21, 1927, 112 O. L. 388. As urged in our principal brief, therefore, pages 94, 95 and 96, it cannot be held that in deciding the *Middletown* cases the Supreme Court of Ohio had in mind any legislative act of abandonment of the part of the canal on which the water power in question in those cases was located, that part of the canal being the part extending from a point 560 feet north of the state dam near the corporation line of the City of Middletown, Ohio, to the present terminus of the canal at St. Bernard in the City of Cincinnati, Hamilton County, Ohio. (Par. 38, Appendix Principal Brief, 236.)

Appellants rely on paragraph 2 of the syllabus of the case of *B. & O. R. R. Co. vs. Baillie*, 112 O. S. 567, which reads as follows:

> "2. The syllabus of a decision of the Supreme Court of Ohio definitely states the law of Ohio with reference to the facts upon which it is predicated, and must be read in view of the facts found in such case."

And relying upon the rule of the Supreme Court of Ohio as an abstract proposition that the law decided by that court in a case before it is declared in the syllabus, counsel for appellants claim that the syllabus of the early cases upon which they rely, namely, the *Hubbard*, *Elevator*, *Fox* and *Walsh* cases, *supra*, respectively, control in the instant case. The same claim was made by counsel in the case of *B. & O. R. R. Co. vs. Baillie*, *supra*,

with respect to the syllabus in an earlier case, namely, *Loftus vs. Pennsylvania Railroad Co.*, 107 O. S. 352, but in the opinion of the *Baillie* case, 112 O. S. 570, the Supreme Court of Ohio states the situation with respect to the *Loftus* case, in the following language:

> "It is now claimed that the language there employed, not only in the opinion, but in the syllabus, is so broad and comprehensive that the decision of this court in that case is also determinative of the question presented by the motion to quash in this case. Because the state of facts here presented is so different from that before the court in the *Loftus* case, the syllabus of that case cannot be regarded as determinative of the issues presented in the instant case. The syllabus of a case definitely states the law with reference to the facts upon which it is predicated, and must be read in view of the facts found in such case."

Now, if the contention of counsel for appellants is the law governing the instant case, then the Supreme Court of Ohio could not have stated the law as it did state it with respect to the third defense in the *Middletown* case, 114 O. S. 441, 442, 457 and 458, nor could it have written the third paragraph of the syllabus in that case in the form in which it is written, page 438. Furthermore, on the theory of counsel for appellants, the Supreme Court of Ohio could not have decided in the second *Middletown* case, 116 O. S. 26, 27, as it did there decide (but without writing a syllabus) that the State of Ohio was entitled, authorized, had the power, to continue to use all the water it had formerly taken for navigation purposes on the Miami and Erie Canal, namely, 8,000 cubic feet per minute, and supply the same to private individuals for hydraulic purposes although navi-

gation on that canal had been abandoned by non-user long prior to the time of those decisions.

In the first *Middletown* case it was admitted in the pleadings that navigation had been abandoned through non-user of the canal for that purpose, and it was admitted that the state had permitted bridges to be built across the canal and that it did not intend ever again to use it for navigation purposes. The law making body of the state, however, up to that time had never made any declaration of abandonment with respect to the part of the canal in question in that case. In the instant case it is specifically alleged in the bill of complaint (R. 4, 5) that navigation on the canal had almost ceased prior to the year 1894 (and this was prior to the execution of appellee's first and principal contract, the Law lease) (R. 68), and this fact is specifically admitted by appellants, third paragraph of the answer (R. 29, 30) and it is admitted in appellants' statement of points (R. 196).

The third paragraph of the syllabus in the *Middletown* case states the law of Ohio "with reference to the facts upon which it is predicated and must be read in view of the facts found in such case." The applicable facts found in that case, admitted in the case under the third defense interposed by the Hydraulic Company to the action of the state, were that navigation on the Miami and Erie Canal had been abandoned long prior to the institution of the case from the State Dam near Middletown northwardly; that the state was then diverting from the Miami River above the State Dam larger quantities of water than it was entitled to have under the terms of the act permitting the appropriation of water for canal purposes and under its contract with

Enoch; that the state had abandoned for navigation purposes the Miami and Erie Canal from the State Dam southwardly to the City of Cincinnati and had permitted bridges, viaducts and other constructions to be built across the canal that make it impossible to use the same for navigation purposes; that since 1913 no portion of the canal had been used for navigation; that it was not the intention of the state to again use the canal for that purpose; and that the purpose of the construction of the canal had entirely ceased. (*Middletown* case, 114 O. S. 441, 442.)

The Hydraulic Company in its third defense did not allege that the legislature had ever passed an abandonment act affecting this part of the Miami and Erie Canal or that it had ever passed any act permitting bridges to be constructed across the canal in a way inconsistent with navigation. The facts are that no such an act, either of abandonment or to permit bridges or other obstructions on or over the canal preventing navigation, was ever passed prior to the decision of that case.

The mere statement of the facts as above related, it seems to us clearly demonstrates that the third paragraph of the syllabus of the *Middletown* case was based and definitely rests upon those facts, the principal one of which is that navigation on the Miami and Erie Canal had been abandoned through non-user of that canal by the public for navigation, and it must be concluded that as a matter of law the state had passed from the status of ownership of this property in its governmental or public capacity to the status of ownership thereof in its proprietary or private capacity.

The Supreme Court of Ohio in the two *Middletown* cases has held that the State of Ohio does have power and is authorized to continue to take water from the source of supply through the canal and supply the same to private individuals for hydraulic purposes in operating manufacturing plants or other industries, and this although such water was originally taken for navigation purposes and although it is no longer used for that purpose because the public long ago refused so to use it—in other words, although the canal was long ago abandoned for navigation purposes, not through any declaration of the legislature of the state but simply because the original, principal purpose of the construction of the canal, navigation, had entirely ceased.

Under the law as declared in the case of *B. & O. R. R. Co. vs. Baillie*, 112 O. S. 567, 570, the syllabus paragraphs of the earlier cases relied upon by counsel for appellants, namely, the *Hubbard*, *Elevator* and *Fox* cases, *supra*, must be held to state the law of Ohio with reference to the respective facts upon which those cases respectively are predicated and must be read in view of the facts found in those cases respectively. The facts found in each of those cases are widely different from the facts involved in the instant case. We have definitely pointed out those differences in our principal brief and deem it unnecessary to restate such differences here.

So far as the state's status and function as an owner and operator of the Miami and Erie Canal lands and the canal are concerned, its status in the instant case is exactly the same as in the *Middletown* cases. Counsel for appellants, except the present attorney general, have claimed that by the mere passage of an act by the Gen-

eral Assembly declaring an abandonment, officially as they term it, the state may restore to itself the function or status of ownership and operation of the canal in a public or governmental capacity, notwithstanding any contracts that may have been made with its citizens during the time when it was clearly functioning in such ownership and operation in its proprietary or private capacity.

If the contention is right that the state could do such a thing or take such action as next above described, then (1) notwithstanding the fact that navigation was abandoned prior to the existence of appellee's contracts and that the legislature, through the Act of 1830, re-enacted in 1840, and the Act of 1902, expressly delegated power to the commissioners and board of public works to readjust the rentals and compensation to be paid to the state by appellee for the time yet to run of its respective contracts and therein ordered such revision and readjustment, and (2) notwithstanding the readjustment described in our principal brief was made with appellee and imposed upon it in addition to all other increased burdens the obligation to expend $53,000.00 in actually improving the state's property, making it a vastly better property, and (3) notwithstanding appellee faithfully performed that obligation, nevertheless the state would have had the power, immediately after such readjustment and immediately after appellee had improved the property of the state by such expenditure, to declare the abandonment of navigation, already abandoned years prior thereto, and to take the water out of the canal and leave appellee wholly without remedy either at law or in equity.

In their statement of points (R. 196) counsel for appellants say that:

> "The state by receiving rents on account of water leases cannot thereby change to a public purpose the incidental use of supplying of water to holders of the leases; such incidental use of the canal is a private use as distinguished from a public one and continues as such notwithstanding the acts of any officers of the state."

We agree that in making such contracts as those of appellee the state acted in its proprietary or private capacity. It began that business through the Act of 1828 (Appendix Principal Brief, par. 11, p. 206) three years after authorization of the construction of the canals by the Act of February 4, 1825, and has continued such business under the Act of 1830 (Appendix Principal Brief, par. 15, p. 208) re-enacted as the Act of 1840 (Appendix Principal Brief, par. 27, p. 215) down to the present time, over one hundred years. The decline of navigation must have begun prior to 1861 when the state leased all its public works to private individuals, and surely it was declining when the Acts of 1863 and 1864 abandoning the southerly and northerly ends of the canal were passed. This decline in navigation steadily continued according to the admission in the record, until when, prior to the year 1894, it ceased. It has never been revived.

C. Appellant's Attitude Toward Abandonment and the Request of His Counsel to Amend His Answer:

Counsel for appellant along with their memorandum reply brief filed under permission from this court,

have also filed a motion asking permission to amend their answer in the particulars shown on page 2 of the printed motion. Their request in brief is that they be allowed to amend the answer denying that navigation on the canal almost disappeared prior to 1894 and ceased prior to 1900 and to show a table exhibiting tolls received beginning with the year 1894 and ending with the year 1918 on the Miami and Erie Canal for freight transportation. While these facts and this memorandum come as a surprise to us, we do not object to the amendment if this court at this late date shall see fit to grant the same. So far as we are concerned the court may assume that the table is correct.

Counsel for appellant in their reply memorandum and in the motion insist that the facts as to these tolls are not material, and under all the circumstances of this case we claim that the receipt of the tolls as shown by the table does not affect the soundness of our contention that this canal had in effect and as a matter of fact been abandoned as a public highway for transportation. The table of tolls itself on its face shows that the canal was doomed as a utility for transportation. This canal on its completion in 1845 extended from its connection with the Ohio River on the south, northerly through the cities of Cincinnati, Middletown, Dayton, Defiance and Toledo to Lake Erie on the north, a distance of approximately 225 miles. The table only indicates that beginning with the year 1894 there were some canal boats on this canal not yet worn out and there were a few people yet transporting some freight by means of those boats. The amount of tolls, however, rapidly declined practically with each succeeding year down to 1915, when the re-

ceipts were $1.09, with the years 1908, 1911 and 1917 showing nothing in the way of receipts. It cannot be presumed that the state, if it received any tolls, did not keep account of the same. The table of tolls definitely, but only, shows the winding up of a business that had failed.

It is true the state constructed this canal for the benefit of the public in transportation. So long as navigation continued the state owned and operated it for the benefit of the public at large. Suppose that when the canal was completed in 1845, the state's ownership thereof was so impressed with a public trust or use for the purposes of navigation that the legislature of the state did not have the power to abandon it for navigation and devote the property to some other use because demand by the public was great for the use of it in transportation. We are not conceding that the legislature would not have had the power even under these circumstances to have devoted the property to other use. We are assuming the proposition only for the purpose of argument. It, of course, will not be claimed by anybody, however, that if the public, for whose benefit the canal was constructed and for whose benefit its ownership became so impressed with a public trust or use, waived its right thereto, if such right existed, and refused or failed further so to use the property, the legislature would not have the power to devote it to some other use. It, of course, will not be claimed by anybody that the state in the case of such refusal, failure or abandonment by the public would be compelled, because of lack of power to dispose of it, to continue to hold this property in the hope of a realization of a possibility that the public at

some future date might again desire to utilize the property in public transportation. Abandonment of this property for public transportation is exactly what happened to it. The table of tolls exhibited by counsel for appellants does not in any way refute this last statement. All the table does is to prove the statement. For the purposes of our contention and argument in the light of the legislative and operative history of the canal, the public had in effect abandoned this property for transportation prior to the year 1894. Any person knowing the extent of this property would know and the court will take judicial notice of the fact that the toll receipts for the year 1894 could not be more than a small fraction of the cost and expense of maintenance of the property. With three or four exceptions the receipts in no year thereafter totalled the receipts of its preceding year. With those exceptions the receipts from each year were substantially lower than the receipts of the preceding year. The table clearly shows that no new equipment went into operation in any year, or if any such equipment did go into operation it went also to failure and total loss. The public therefore did abandon this canal for navigation purposes. It absolutely waived the public use with which the property was impressed, if it ever was so impressed.

There are certain powers of a government against the exercise of which the state may not contract and from the exercise of which it may not escape in a legal sense and continue to answer the purposes of government. It may not escape the exercise of its police power in its public governmental capacity but in proper cases it may even contract against its power of taxation. The

handling by Ohio, however, of this Miami and Erie Canal property never was and is not done under its police power. When the public abandoned the property for transportation, waived its right to have it remain impressed, if it ever was so impressed, with a public use, namely, a use for transportation, then the state as a sovereign state was authorized to use this property in such a way as it might deem to be for the best interests of the state and her citizens.

But the ownership of this property by the state never was impressed with a public trust or use preventing it from abandoning any part of the canal and selling the same free of both public and private use. That proposition being true and sound in law, then the state as a sovereign state must be held to have the power to deal with these canal lands and the canal and water thereof in its proprietary or private capacity and to make contracts with individuals binding upon both the state and the individuals, the same as may be done between private individuals themselves. This is clearly established by the case of *Railroad Co. vs. The State ex rel.*, 85 O. S. 251, 296, involving the sale through legislative act of the north two and seven-eighths miles of the northern division of the Ohio Canal at Cleveland. On page 296 of the report of this case the Supreme Court of Ohio uses the following language:

> "But the state in its proprietary capacity is amenable—if we assume that there was a departure from the designated use—to the rule well established in this state, that however it may be with respect to deeds of gift, where deeds rest upon a valuable consideration and a statement of inducements or purpose with respect to the use of prop-

erty granted, is disregarded, title will not revest in the grantor unless it be in pursuance of a stipulation in the grant that it shall revest."

In the instant case a valuable consideration passed from appellee to the state in appellee's assumption and performance of the entire cost and expense of the maintenance of the property from where it connects with the Maumee River above the Grand Rapids State Dam, including the dam itself, northeasterly to Lock No. 45, northeasterly of the hydro-electric plant, and the agreement by appellee followed by full performance thereof to make of the state's property a vastly better property, which performance appellee did at a cost to it of $53,000.00. The consideration passing from appellee to the state is clearly shown by appellee's contracts, Stipulation Exhibit No. 1 (R. 68, 70, 71) and Stipulation Exhibit No. 2 (R. 74-76).

The state acted in its proprietary or private capacity when it turned over to the City of Cincinnati the south end of the canal, extending from the Ohio River northerly in that city to the east side of Broadway. This was done under the first abandonment act (Appendix, p. 221). The same was done with the north end of the canal, extending from Lake Erie southerly to the northerly end of Lineal Part 1. This was done under the second abandonment act (Appendix, p. 223). *Malone vs. Toledo*, 34 O. S. 541.

This power was also exercised by the state when it sold Lineal Part 1 in question in this case under the Act of January 22, 1920 (Appendix, p. 225). This is the act under which Toledo purchased Lineal Part 1 and the act was construed in the case of *The Maumee Valley*

Electric Co. vs. Toledo, 13 Fed. (2d Series) 98-105. The state also acted in the exercise of this power when it passed the Act of March 27, 1925, offering Lineal Part 2 of the canal, directly in question here, for sale to the commissioners of Lucas County, Ohio (Appendix, p 230). *Appleby vs. New York*, 271 U. S. 364, 399; 70 Law Ed. 992, 1007. *State ex rel. vs. Middletown*, 114 O. S. 437.

D. Upon Abandonment of Navigation by the Public, or at Least When Abandonment Became Inevitable, the State Then Provided for Other Use of the Property:

When the public had practically abandoned the Miami and Erie Canal for navigation purposes, with total cessation inevitable, the state attempted to revive navigation, but in the same legislation it provided for other uses to be made of the property in case the public should not return to the principal use. We do not know whether any of the parties opposed to appellee in the litigation over its rights had ever heard of the legislative acts we are about to mention and have already mentioned in our principal brief, but the facts are that from the beginning we have cited these acts as attempts on the part of the state to revive navigation and at the same time through one of those acts to provide for the use of the property if the public should continue in its refusal to use it for navigation. The first act to which we refer is known as the "Electric Mule Act," passed April 25, 1898, (Appendix, p. 244). This act wholly failed of its purpose. The second attempt by the legislature to revive navigation was the act passed April 9, 1902, (Appendix, p. 246). This

act declared that the Miami and Erie Canal, together with its water supplies, reservoirs, etc., should be retained and maintained as a public canal. It also provided that if anybody would put boats on the canal the state would pay the value thereof if it should ever abandon navigation rendering the boats useless. All we need to prove that both of these acts failed is the table of tolls now submitted by counsel for appellant. But in passing this act the legislature was wise in its provisions for the inevitable failure in its efforts to revive navigation. In Section 4 of that Act the General Assembly authorized and commanded the Board of Commissioners, together with the Board of Public Works, to investigate all the then present water rate contracts on the Miami and Erie Canal and the northern division of the Ohio Canal and revise and readjust them upon a fair and equitable basis as to rentals to be paid in the future. Appellee's principal lease, Stipulation Exhibit No. 1, (R. 68) was then in existence, owned by appellee. That lease was revised, readjusted, modified in pursuance of that Act, supplementing the broad powers conferred by the Act of 1830, (Appendix, p. 208) re-enacted in 1840 (Appendix, p. 216), retained and carried as the law down to March 21, 1917 (Appendix, pp. 217, 218). This later Act of 1902, therefore, did two things, (1) it encouraged users of hydraulic power to make contracts therefor with the state because in Section 1 of that Act the legislature declared it to be the settled policy of the state that the Miami and Erie Canal, together with its water supplies, reservoirs, dams, feeders and adjacent lands from Cincinnati to Toledo, would be retained and maintained as a public canal, and (2) in Section 4 it authorized and commanded the Board

of Public Works to revise and readjust all then existing water rate contracts upon a fair and equitable basis as to to the rents to be paid by the lessees to the state for the future running of those contracts.

With appellee relying (R. 161, 162) on those statutes, the readjustment of appellee's principal contract, Stipulation Exhibit No. 1, (R. 68) was accomplished through the supplementary agreement modifying the principal contract, Stipulation Exhibit No. 2, (R. 74). Appellee, relying upon the laws passed by the legislature as mentioned above, did all the things for the state and for itself at a large expenditure of money, which we have already discussed and shown herein and in our principal brief.

E. The Attorney General, Present Counsel for Appellant Kirk, Admits That the Ownership of the Property in Question Here Is Not Impressed With a Public Use Preventing the Making of Such Contracts as Those of Appellee Through Legislative Act Direct, or Properly Delegated Authority, But He Contends That Appellee's Contracts as Such Are, in Their Terms and Under the Circumstances of Their Existence, the Same as the Contracts Involved in the Earlier Cases on Which He Relies and Therefore Ruled by Those Cases:

In all the litigation in which opponents of appellee have involved it since the fore part of 1925, respecting appellee's rights under its contracts, up until now the claim has been made by such opponents that the ownership of the Miami and Erie Canal lands and the waters

thereof was impressed with a public use preventing the state from making valid contracts, such as those of appellee, extending for terms beyond a time when navigation should cease on the canal either through non-user or through declaration of a legislative act. The present attorney general is the first to take the position indicated in the above heading. We have always contended for appellee that the ownership of the property was not impressed with a public use preventing appellee's contracts as valid contracts according to their terms, and we have also always claimed that those contracts in themselves and the circumstances out of which they arise are essentially different from the contracts involved in the earlier cases and therefore are not ruled by those cases.

On pages 2 to 7 of the memorandum reply brief of appellant, counsel attempt to show that appellee's contracts are the same as the contracts involved in the earlier cases on which they rely. There were no doubt some provisions in the leases considered in those earlier cases the same as appear in the contracts of appellee. The statute of 1830 as re-enacted in 1840 required a certain reservation to be written into every contract. That requirement was that each contract should contain a reservation to provide that if the state should ever find it necessary to resume the water called for in the particular contract in any case for the *purpose of navigation* then the state could so resume. No other reservation is required. It is not likely that in executing contracts the board of public works without legislative authority would depart from the specific requirements in those statutes. We understand they never have so departed. There is one dominant and all-important pro-

vision, however, in appellee's contracts which evidently did not appear in the contracts considered in the earlier cases. That provision (not specifically required by statute) is the one which places upon appellee the duty and obligation of bearing the entire cost and expense of the maintenance of the Miami and Erie Canal from where it connects with the Maumee River above the Grand Rapids State Dam northeasterly to Lock 45, three-quarters of a mile north of the hydro-electric plant at Maumee. (R. 70-71.) And this includes, of course, the Grand Rapids State Dam.

Appellee's supplementary lease and agreement is wholly different from any of the contracts involved in the earlier cases. It is like appellee's principal contract, which it modifies, in that in this supplementary agreement appellee reassumes the cost and expense of the entire maintenance of this canal. In addition to that it is different from any of the other contracts, in that through it it obligated itself at the request of the board of public works in the readjustment and revision of the Law lease greatly to improve the state's property. This improvement of the state's property was to be done by appellee at its own cost and expense by removing rock bars in the canal near the Village of Waterville and all other obstructions therefrom on the eighteen-mile level and to raise the banks of the canal from the point where it joins the Maumee River above Grand Rapids State Dam northeasterly to Lock 45 in the Village of Maumee. No such obligation was put upon, or assumed or performed by the lessees under the contracts involved in the earlier cases. Appellee performed this work at its own cost and expense in the sum of $53,000.00. In addition to the

above, appellee was required to pay the compensation of three patrolmen to be appointed by the state to patrol this canal from Grand Rapids to Lock 45 in order to prevent breaks in the canal banks, repair leaks, remove logs, brush and other impediments to the free and even flow of the water in the canal. Through this supplementary agreement it was agreed between the parties that the service rendered under the terms of the principal lease was unsatisfactory and that the compensation named in that lease was inadequate for proper and satisfactory service. In all these respects, just mentioned, appellee's principal lease and this supplementary agreement were essentially different from the provisions of the leases involved in the earlier cases. (R. 74, 75.) In consideration of these promises and the performance thereof by appellee, the state agreed to cause to be let into the eighteen-mile level of the canal at Grand Rapids, from the pool above, waters of the Maumee River equal to the safe capacity of the canal for use for hydraulic purposes at the works of the company located near Maumee. No such a provision as this appeared in the leases involved in the earlier cases.

In appellee's principal lease it is specifically provided that if appellee shall fail to maintain the canal from Grand Rapids to Lock 45 by keeping in repair the weir, head and tail race, "and all *other works and devices* connected with the use of the water hereby leased," then the state might perform the work, charge the cost and expense thereof to appellee, and in the lease appellee agrees in such a case to pay such cost and expense to the state on its demand (R. 70, 71). No such provision as this appeared in the earlier leases. When the attor-

ney general therefore in his memorandum reply, on pages 4 and 5, says that in appellee's contracts there was no agreement actually to deliver water under such contracts, he is plainly in error. In consideration of the work and other things which appellee agrees under the supplementary agreement to do for the state, the state does agree as stated above to cause to be let into the eighteen-mile level, being all of Lineal Part 2 and the south 1.6 miles of Lineal Part 1 of this canal, from the pool above the Grand Rapids Dam, waters of the Maumee River equal to the safe capacity of the canal, to be used by appellee for hydraulic purposes at its works located in Maumee. True, this clause says this will be done consistent with the rights of navigation upon the canal. At the time this supplementary agreement was executed, however, there was no navigation upon this canal in the true sense. Even according to counsel's table of tolls, there existed at that time in the matter of navigation only the winding up of a business that had failed.

Counsel reminds us that the earlier cases held that the lessees in the contracts involved in those cases were mere licensees or privilegees. The answer to this is that when those earlier leases were written navigation was in progress upon the Miami and Erie Canal from its connection with the Ohio River on the south to its connection with Lake Erie on the north, and after the southern end in Cincinnati and the northern end in Toledo had been abandoned navigation still went on from Toledo on the north to Cincinnati at the south. Nobody would claim that under the statute of 1830, as re-enacted in 1840, the board of public works had power to make a contract leasing or selling such an amount of water as would

destroy, or even hinder navigation. These statutes expressly provided against that by requiring a reservation in every lease giving the state the right to resume any water leased or sold in case the same should become necessary for *navigation.*

True, when the *Hubbard, Fox* and *Elevator* cases arose and were decided the southerly end in Cincinnati of the canal and its northerly end in Toledo had been abandoned by the first two abandonment acts, respectively. As already shown, there was no provision in either of the leases involved putting the maintenance of the canal upon the lessee, and the court in those cases held that under such circumstances it would not require the State of Ohio to incur the cost and expense of keeping up the canal simply for a small hydraulic power. The court said that the statutes of 1830 and 1840 should not under such circumstances be construed as conferring so broad a power upon the board of public works as would permit that board to impose such a burden upon the state.

In the instant case, however, an entirely different situation appears. When appellee's principal lease was written the Miami and Erie Canal had become useless as a means of canal transportation. The state's business as a public carrier through navigation had failed. This fact was known to the General Assembly and to everybody. Complete cessation was only a matter of winding up. Railroad deevlopment had progressed to a status where canal transportation under commercial and social conditions of that time was simply impossible. The state did not allow this situation to pass without notice and without effort to revive navigation through

some concessions more favorable than had ever up to that time been made. Accordingly, the legislature passed the Electric Mule Act. This act proved of no avail whatever. In this state of affairs came the Act of 1902 from the legislature as another and the final and a liberal offer to the public as an inducement to it to return to this canal as a utility for navigation. It was no inducement. In that act, however, the legislature made provision calculated by it to avert total loss of the property. Through Section 1 of that act (Appendix, p. 246) the legislature published to the citizens of Ohio its declaration that it was the settled policy of the state that this canal, together with its water supplies, reservoirs, dams, feeders and adjacent lands from Cincinnati to Toledo should be retained and maintained as a public canal. The attorney general, giving his legal philosophy as to the earlier decisions on the contracts involved in them (p. 5 of his memorandum reply brief), says that the early contracts were construed in the light of the fact that the state might want to abandon the canals, and he said, "If no canal, no water." We would say also, "If no canal, no navigation, but there may be no navigation and still there may be a canal." This exactly describes the situation with respect to this canal when the Act of 1902 was passed. Although there was no navigation, this act said to everybody there will still be a canal. And then in Section 4 the legislature directs the state's board of commissioners and public works to go to every owner of a water contract at that time on the Miami and Erie Canal and the northern division of the Ohio Canal (Appendix, p. 247) and say to such owner, the state commands us to revise and readjust your con-

tract upon a fair and equitable basis as to the compensation you shall pay to the state for the future running of your contract. The legislature, however, did not change the Acts of 1830 and 1840 giving the board of public works broad discretionary power to make such contracts upon such terms and conditions as the board might deem for the best interests of the state and to grant such contracts, either in perpetuity or for a limited number of years, upon a certain annual rent, *or otherwise.* The state allowed those statutes to stand in their broad terms from 1830 to 1917 and then it amended them only in that it limited the terms for which such contracts might be written to a maximum period of twenty-five years.

It is significant that after the statute of 1830 was passed it was re-enacted without change in 1840, except to designate the board of commissioners as board of public works. Thereafter it was incorporated into the Revised Statutes of Ohio of 1880 as Sections 7775 to 7779, respectively, and thereafter it was carried by the legislature into the General Code of Ohio of 1910 as Sections 14009 to 14013 (Appendix, pp. 216, 217).

And so with navigation gone the legislature of the state through the Act of 1902 advised everybody that it would retain and maintain the Miami and Erie Canal as a public canal, and through Section 4 it said plainly in effect to every owner of a water contract on that canal, we recognize your contracts and now that navigation is gone we want to give the best service we can give through this property for hydraulic power and thereby, through a readustment and revision of your contracts, procure more money for the state. No such circumstances or sit-

nation as that described above obtained with respect to the contracts passed upon in the earlier cases.

Suppose that an individual or a private corporation were operating a private canal for navigation and furnishing water for hydraulic power; that the business of navigation had failed or was in rapid, noticeable decline and that complete cessation of navigation within a short time were certain; that such private owner and operator should represent and publish to the public that even though navigation had ceased or it was inevitable that it soon would pass to complete cessation, his private canal would still be retained and maintained as a canal; and that he should go to all of his customers, users of water from his canal for hydraulic purposes, and say to them, I want to give you better service in the use of water for hydraulic power, but now that the other branch of my business, navigation, is gone, or is sure soon to cease, I must raise the compensation which you shall pay to me for the improved service which I will give you throughout the future running of your contracts, in the furnishing of water for the operation of your hydro-electric plants or other industries; in short, suppose that such private owner and operator should do exactly what the State of Ohio did in the instant case and that all or any one of his then present customers, because of his public publication and representation as to his proposed continuance and maintenance of his canal and of his negotiation on his own motion for higher compensation, should have revised and readjusted their contracts with him, and therein agreed to pay him largely increased compensation, and under the requirement of such contracts, as revised, spend large amounts of money in im-

proving, making better, his canal property, agreeing therein to maintain the same at their own expense, and in improving and extending their own plants at great cost, we ask whether such a contract as that would be enforced by the courts through judicial proceedings, either at law or in equity. The mere statement of the question compels an answer in the affirmative.

Since it is conceded by the attorney general that while the state in making these contracts acted in its capacity as a sovereign state that fact does not give it a right to violate such contracts as are in question here, then the state must stand in the same relation to appellee and its contracts with the state as the above supposed private individual would stand with respect to his above supposed contracts. The only difference is that appellee may not proceed against the state for damages because there is no statute in Ohio permitting such an action against the state. Appellee's only remedy is by injunction. (Our Principal Brief, 163.) *Rodebaugh vs. State*, 96 O. S. 513.

F. After the Execution of Appellee's Contracts, They Were Ratified, Approved and Confirmed:

Appellee's principal lease, the Law lease, was executed under the power granted through the Act of 1830 (Appendix 208) re-enacted in the Act of 1840 (Appendix 216). It was thereafter approved, ratified and confirmed by Section 4 of the Act of 1902 (Appendix 247). In that section of the Act the legislature of Ohio commanded the administrative board to investigate all then existing water rate contracts on the Miami and Erie Canal and

the northern division of the Ohio Canal, and revise and readjust them upon a fair and equitable basis as to the rents to be paid in the future.

In pursuance of those acts appellee acquired all its other contracts, Stipulation Exhibits 2 to 7, inclusive (R. 74 to 101).

All of appellee's contracts were approved, ratified and confirmed by the Act of January 22, 1920 (Appendix, p. 225).

They were again approved, ratified and confirmed by the Act of March 27, 1925 (Appendix, p. 230).

That the State of Ohio had the power thus to ratify, approve and confirm appellee's contracts there, of course, can be no doubt.

> Maumee Valley Electric Co. vs. Toledo, 13 Fed. (2nd) 98-105.
>
> Jefferson City Gas Light Co. vs. Clark, 95 U. S. 644, 645, 655; 24 Law Ed. 521, 523.
>
> Chucco Tioco vs. Forbes, 228 U. S. 549, 555, 556; 57 Law Ed. 960, 964.

So that if there was any defect of power in the board of public works to execute appellee's contracts as valid and binding contracts upon the state and appellee, that defect was cured by the acts of the legislature cited above.

G. By the Established Principles of Equitable Estoppel the State Is Prohibited From Taking the Action Sought By It to Be Taken Through the Act Attacked in This Case, and That Act Must Be Held to Be Null and Void as Violating the Contract and Due Process Clauses of the Federal Constitution With Respect to Appellee's Contracts:

We have discussed this subject in our principal brief (pp. 167 and 168) but here we would add in further support of our contention in the above heading, that the situation is as follows:

The state by enacting, re-enacting and retaining the statute of 1830 (Appendix, 208, 216) and carrying that statute with its broad powers thereby granted to the state's agency, the board of public works, into the Revised Statutes of 1880 and the General Code of 1910 down to March 21, 1917 (Appendix, 217), a period of eighty-seven years, certainly gave the public in Ohio to understand that it believed those statutes sufficient and proper for the delegation of powers to that agency authorizing the agency to deal with the citizens of the state on the subjects covered thereby; and what would be more natural than for individuals to believe that the state meant for the agency to deal with the individual in the light of and having reference to the conditions prevailing at the time of such dealing of the Miami and Erie Canal lands and the waters thereof belonging to the State of Ohio? The statute of 1830 expressly gave power to the state's agency to execute such contracts as those of appellee for a *limited number of years* or in *perpetuity* at a certain annual rent, *or otherwise*. This statute was

never changed, as stated above, until 1917, and then it was changed only in that it provided that from that year on future contracts should not be made under the statute for a longer term than twenty-five years. In 1917 navigation was gone even according to the table of tolls submitted by the attorney general.

We have shown in our principal brief that the State of Ohio began making such contracts as those of appellee with individuals on and along all of the canals of the state, and that practice has continued until the present time at all points where hydraulic power had been developed. The only express reservation required by the statute to be placed in each contract was a reservation that if the water taken under the contract in any case should at any time be deemed necessary for *navigation*, the state should be at liberty to cancel the contract. No one of the acts of abandonment discussed in this case, including the Act attacked here, was passed for the purposes of navigation. Upon the passage of each of those Acts navigation on the part of the canal affected thereby was, of course, at an end. Yet through all these years the statute of 1830 was kept in force through its enactment and re-enactments as above described.

Now with that legislative history of the canal and with the operative history thereof in navigation in the mind of the general assembly (the operative history being that navigation in the later years had utterly failed and passed in fact, not to be revived as a business) nevertheless the legislature in 1898 passed the Electric Mule Act and in 1902 it passed the Act of that year (Appendix, 244, 246), the sole purpose of the Electric Mule Act being an attempt to revive navigation, and one of the purposes

of the Act of 1902 being another and the last attempt to rehabilitate the business. Through these Acts the legislature administered the last "death bed stimulant" to a business that had failed and was winding up.

Under this discussion let us see just exactly what the state did to induce its citizens to continue the making of contracts with it for hydraulic power. In Section 1 of the Act of 1902 it announced and declared to all citizens in Ohio that it was "the settled policy of this state that the Miami and Erie Canal, together with its water supplies, reservoirs, dams, feeders and adjacent lands from Cincinnati to Toledo, shall be retained and maintained as a public canal," and it declared and announced the same thing with respect to the northern division of the Ohio Canal. Keeping in mind the fact that navigation had failed and as subsequent events have shown it was then certain of early complete cessation, and keeping in mind of course that that fact was known to all the citizens of Ohio, was common knowledge, what would be more natural than for such citizens to feel that because of the declaration above quoted there would still be a canal although on it there would be no navigation?

The next thing the state did in this act was accomplished in Section 4 thereof. In that section the legislature in effect said to its agency, the board of public works, you are authorized and you shall go to each and all the owners of water rate contracts on the Miami and Erie Canal and the northern division of the Ohio Canal and revise and readjust them upon a fair and equitable basis as to the rents those owners shall pay under those contracts through the future running thereof, and as a guide to you in making those contracts we leave in force

the old statutes giving you power to make these contracts for a limited number of years or in perpetuity, for hydraulic purposes, under such conditions and reservations as you may think necessary and proper "for a certain annual rent, or otherwise," as you may deem most beneficial for the interests of the state (Appendix, 247, 208).

When appellee acquired its principal lease in 1900 (R. 68) and again when it acquired the supplementary agreement (R. 74) it relied upon the practice of the state established in 1825 and followed through all the years subsequent thereto down to the acquirement of those contracts by appellee, and it especially relied upon the Act of 1902 (R. 161). Thus relying upon the Act of 1902, passed, declared and published to the public and expressly extending authority to the state's agency, as shown by the Act, appellee entered into the supplementary agreement, through which it obligated itself to pay greatly increased rentals over what it had theretofore been paying to the state, reassume the maintenance at its own sole cost and expense of all of this canal, designated by us as Lineal Part 2 and the southwesterly end of Lineal Part 1 to Lock 45, and agreed greatly to improve this property for the state. It has faithfully performed each and every obligation put upon it or assumed by it in each and all of its contracts, and in that performance it expended strictly in accordance with the requirements of the state, the sum of $53,000.00 in improving the state's property, making a better property thereof so that the state could realize more revenue for itself and in the transaction escape all further expense as to maintenance of the property to the end of the terms provided for in the contracts. In consid-

eration of the obligations of appellee and its performance thereof, the state agreed to let into this canal property from the pool of the river above the dam for the use of appellee for hydraulic purposes at the hydro-electric plant in Maumee, generating electricity to be sold for light, heat and power to the public, all the water that the canal would safely carry. The state has complied with that obligation from the beginning until now, although, except for the proceedings by appellee in the instant case, it would have cut off the supply in accordance with the act attacked in this case, through which the state attempted to nullify, make void and repudiate appellee's contracts, formally entered into under authority of the law as heretofore related, statute law formally passed by the law-making body of the state, in an effort to build up for the state a revenue producing business in furnishing hydraulic power after the original business or purpose of the canal had failed. Relying upon the practice of the state under its laws formally passed as aforesaid, appellee not only complied with all the obligations put upon it or assumed by it under the contracts, but in accordance with the plan devised by the state's duly authorized agency and appellee it spent great amounts of money in extending its hydro-electric plant at Maumee from a small plant of four hundred water horse-power to a larger and efficient plant of twenty-seven hundred water horse-power, with a capacity of generating ten million kilowatt hours of electricity per year (R. 160-169).

The mere statement of the facts commands the application of all the principles of equitable estoppel against the state and the act attacked in this case. The instant case is different from the case of *Railroad Co. vs.*

State ex rel., 85 O. S. 251, only that in the latter case the state conveyed to the City of Cleveland the fee simple of the northern end of the Ohio Canal, while in the instant case it has granted for a term of years complete control and use of the property in question, Lineal Part 2 and the southwesterly 1.6 miles of Lineal Part 1, with all the water which the canal will safely carry from the pool of the Maumee River above the dam northeasterly through those parts to the hydro-electric plant in Maumee, excepting only therefrom such water as goes to The Providence Mill Company, at Providence, and to The Toledo Grain & Milling Company, at Toledo. *Los Angeles vs. L. A. C. Water Works Co.*, 177 U. S. 558, 583, 584; 44 Law Ed. 886.

H. The Contract Between Ohio and Toledo for the Benefit of Appellee and the Decision in Maumee Valley Electric Company vs. Toledo:

For appellee we claim that the obligations of the contract entered into between the State of Ohio and the City of Toledo in pursuance of the Act of January 22, 1920 (Par. 35, Appendix, 225) *for the benefit of appellee*, are impaired within the provisions of the contract clause of the Federal Constitution by the act attacked in this case (Par. 39, Appendix, 236), and that this last mentioned act violates Section 1 of the Fourteenth Amendment of the Constitution as depriving appellee of its property in that contract without due process of law. We have discussed this point beginning at page 168 of our principal brief where all the applicable decisions we have been able to find are cited and discussed. We shall not write much in addition here.

At pages 16 to 18 of his memorandum reply brief, the attorney general exhibits some discussion of the case of *The Maumee Valley Electric Company vs. Toledo*, 13 Fed. (2d) 98, which case established that contract. He calls attention to the language of the Act of January 22, 1920, which expressly provided that if Toledo should accept the grant, then it should "pay the water lessees a fair compensation for the loss of the water to which they are entitled," and he says that there are no such provisions in the act attacked in the instant case. That statement is true and its truth, or rather the fact that no such provisions do appear in the act giving rise to the instant case, is just the fact of which we were complaining. If the act complained of here contained provisions providing for compensation to be paid to appellee on the draining of the water from the Miami and Erie Canal and thus destroying appellee's water rights under its contracts, such compensation to be determined by agreement or through due process of law under the power of eminent domain, then we would have no ground for complaint. We complain of the act in question here because it arbitrarily attempts to declare all contracts null, void and of no effect and ruthlessly to destroy, confiscate, our property; property acquired on the representation and solicitation of the state, as already heretofore discussed herein and in the principal brief; property acquired as the result of compacts between appellee and the state carried forward to consummation under orderly and due forms of law. The Constitution is the state and in the higher and better conceptions by the citizens of the function of the state, he feels and he knows that the Constitution cannot nor does it do any wrong to the citizen.

The legislature, however, of the state is another matter. It may not, at any rate it will not be presumed to do intentionally a wrong to a citizen, but in its individual membership or in the body of the whole it often falls far short of the higher and better conception above mentioned, and in its action it does pass legislation which, if permitted to stand, would do great injustice to the citizen through violation even to the point of nullification and repudiation of his constitutional rights. The act in question in this case is in our mind without any doubt whatever such an act. It is that kind of an act with respect to the particular contract now under discussion. The attorney general, page 17 of his brief, says that Judge Knappen indicated in the decision in *Maumee Valley Electric Company vs. Toledo*, that there was no obligation on the state legislature in passing the Act of 1920 to protect the rights of the state's lessees under their existing leases of either lands or water or both and their rights to a renewal thereof, we using the language of the act. The facts are that Judge Knappen said exactly the opposite, and in saying it he used the following language:

> "It is enough that as we think it chose rather to recognize its moral obligation to respect the rights of its lessees, property holders and citizens."

(Principal Brief, 179.) This court has said in effect that the state may be indebted to a citizen through

> "debts or claims which rest upon a merely equitable or honorary obligation and which would not be recoverable in a court of law if existing against an individual. The nation, speaking broadly, owes a debt to an individual when his claim grows

> out of general principles of right and justice; when, in other words, it is based upon considerations of a moral or merely honorary nature such as are binding on the conscience or the honor of an individual although the debt could obtain no recognition in a court of law."

(Principal Brief, 185.) It is true the State of Ohio was not a party to the case of *The Maumee Valley Electric Company vs. Toledo*, but it is true that it was a party to the contract between itself and Toledo entered into in behalf of and for the benefit of appellee. The attorney general says that in this case we are interested with legal and not moral obligations. We are surprised at this statement from the learned attorney general because moral obligations have ever had a place in equity jurisprudence. They always will have such place it equity jurisprudence shall endure.

Now let us at no time forget that the hydro-electric plant at Maumee is located on Lineal Part 1 of the canal which is the part purchased by Toledo under the Act of January 22, 1920, and in pursuance of which the contract between Ohio and Toledo for the benefit of appellee was entered into. Further, we must remember that all the water guaranteed by the state to appellee must be brought from the pool of the river above the Grand Rapids Dam northeasterly through Lineal Part 2 sought to be abandoned by the act attacked in this case and carried on over the southwesterly 1.6 miles of Lineal Part 1 purchased as aforesaid by Toledo. Toledo has claimed since the passage of the Act of 1920 that appellee and other lessees had no rights under that act and that they could have no rights as against any abandonment act.

That city has therefore involved appellee in long and expensive litigation in an effort to acquire Lineal Part 1 free from appellee's rights and without the additional cost which the Act of 1920 said Toledo should pay for Lineal Part 1, that is, a fair compensation to appellee for the water to which it is entitled under its contracts. When the city was defeated in the first litigation, *Maumee Valley Electric Company vs. Toledo, supra*, it then still refused to pay appellee any compensation or to settle with it in any respect, and it refuses to acquire appellee's rights through the power of eminent domain. Instead of complying with the contract into which it solemnly entered, as said by Judge Knappen in the opinion of the *Maumee Valley* case, it procured introduction into the legislature of Ohio of the act now in question. Toledo and Lucas County had five members in that General Assembly. The executive officers of Toledo, Lucas County commissioners, and the executive officers of the Villages of Maumee and Waterville, together with those five members of the General Assembly, diligently worked for and urged the passage of the act. The bill passed, was vetoed by the governor, and then those same executive officers and Lucas County's members of the General Assembly, some of them on the controlling committees of each house, lobbied through the bill over the veto of the governor. (Sec. 18; R. 66-67.) The bill on its face shows (Principal Brief, 192) in connection with the action above described, that this act was passed really simply for one purpose, namely, to allow Toledo to build a boulevard on that part of Lineal Part 1 of this canal which lies within the city limits of Toledo without complying with its contract to compensate appellee. The

westerly city limits of Toledo are about two miles easterly from the hydro-electric plant. Of course Toledo could not spend the money of the taxpayers of that city to build a boulevard beyond its limits.

Taking into consideration the Act of January 22, 1920, the deed from Ohio to Toledo (Stip. Exhibit No. 15, R. 133) for Lineal Part 1 issued under that act (Appendix, 225), together with the act attacked here (Appendix, 236) abandoning Lineal Part 2 of the canal, which part lies between the southwesterly end of Lineal Part 1 and the pool of the river above the dam and through which Lineal Part 2 and southwesterly 1 6/10 miles of Lineal Part 1 all the water must pass, it becomes perfectly apparent that the sole purpose of the act attacked in this case is to enable Toledo to build a boulevard on a part of Lineal Part 1 without complying with its contract to compensate appellee for its rights. The State of Ohio was a party to that contract and became a party to it recognizing its obligations to its lessees. We claimed in that first litigation that the state was legally bound to protect appellee and the other lessees on the canal and that if the Act of 1920 had not so protected appellee, then that act would have been unconstitutional. We made that claim on the principles and grounds forming the basis of our contention here.

One thing more, and that is that in that first litigation Toledo was and is permanently enjoined from interfering with appellee in the enjoyment of its water rights on this canal in any way until it should comply with its contract now under discussion, failing in which the water should continue to run in the canal to the hydro-electric plant. (Final Decree on Mandate, R. 138.) That de-

cree, based on the provisions of the legislative Act of 1920 solemnly passed by the State of Ohio, secures to appellee a complete remedy against invasion of its rights by the City of Toledo who seeks to confiscate and destroy them. The State of Ohio, through the act in question in this case, seeks to repudiate its action through the former act, to repudiate the contract into which it entered for the benefit of appellee, and finally to nullify and destroy the final decree and thereby wholly deprive appellee of any remedy either at law or in equity. The contract and due process clauses of the Constitution of the United States do not say that a contract made between two parties for the benefit of a third is not included within their protective provisions. Their provisions are general, and for ourselves we can conceive no argument or reason why the contract under discussion here must not be held to be within their provisions.

II

CASE NUMBER 675, OCTOBER TERM, 1928

A. The State's Title to the Water Power:

In respect of *The Providence Mill Company* case (No. 675) no adequate answer has been made on behalf of the state to the point made at pages 26 *et seq.* of appellee's brief, in substance, that the state's title to Minor's property was never more than a qualified fee, *i. e.*, a fee subject to Minor's fee simple title to the water power restored to him by the state's grant of September 1, 1842. In the *Middletown* case, 114 O. S. 437, the court expressly held the water power, reserved in part to

Enoch and conveyed in part by him to the state, to be *jointly* owned by them, such that the state could not thereafter deprive Enoch's successor of the water power. In this connection the court took pains to point out that there is no provision in the canal acts prohibiting the canal commissioners from taking less than a fee simple by gift or grant; that the court had not up to that time passed upon the rights of the commissioners to take less than a fee simple title and therefore there was nothing to prevent the court from holding, as it proceeded to do, that the occupancy and use of the water amounted to a joint tenancy between the state and Enoch's successor.

And as intending to clinch the nail, the court said in the *second Middletown* case (116 O. S. 26):

> "The state acquired its right, by grant from Abner Enoch, to a *joint use* with him of the water from the pool created by the brush dam, and a *joint use* with him of the mill race for canal navigation purposes. The state entered into such a *joint use*, and has continued ever since in such use under such grant. * * * The defendant *has title as against the state* to the use of 19,463.50 cubic feet of water per minute in excess of 8,000 cubic feet per minute, to which the state has title * * *."

If Enoch acquired a valid title in fee to the reserved part of the water and the state acquired title to the remainder under the circumstances in that case, we altogether fail to understand why, under the similar circumstances in the case at bar, Minor acquired any less title to the water restored to him by the grant of September 1, 1842, leaving title to the remainder of the water in the state as in the *Middletown* case.

So also, neither the argument nor the briefs on behalf of appellants have negatived the point made at pages 28 and 29 of the brief for appellees, in substance, that in order for the state's seizure of Minor's water power to have vested a fee simple title in the state it must have been clearly apparent from the facts that both the state and Minor knew or should have known at the time of the execution of the agreement of September 1, 1842, that the water had been appropriated in *fee simple* by virtue of the seizure.

Miller vs. Wisenberger, 61 O. S. 561.
Smith vs. State, 59 O. S. 278.

Applying the foregoing to the case at bar, we think it must be conceded that the occupancy by the state of Minor's water power and the land upon which it was located was not, nor was it intended to be, exclusive and in denial of the claimed rights of Minor. It is true that the state took possession of Minor's water power and the land occupied by him; it is true, also, that the taking of possession was for canal purposes. But when it is considered that, almost concurrently with the taking, the state restored to Minor the equivalent of his former water power and that in the same instrument (agreement of September 1, 1842) the state was careful to secure from Minor a *conveyance of all of his other property and rights*, the conclusion is irresistible that the state never intended to occupy Minor's water power to the exclusion of Minor himself, and that when the state, by the agreement of September 1, 1842, restored the water power to him, his heirs and assigns, it was consistent with one and only one theory, to-wit: that Minor

was to receive back his water power exactly as he had previously owned it, *i. e.*, in fee simple, subject only to its paramount use by the state for navigation purposes. And surely no one will seriously contend that the agreement of September 1, 1842, was merely by way of compensation for damages suffered by Minor for the seizure of his *mill;* he received a separate award of $2500 for that. Surely no one will contend that in compensation for his water power the state intended to give and Minor intended to receive a temporary water *lease* which (according to appellants' contention) might be terminated at any time by the state's abandonment of the canal. To the contrary it *must* have been the intention of the parties that Minor was to be vested in fee simple with the title to a definite amount of water, *i. e.*, sufficient to turn eight pairs of millstones, and that his rights in that respect were to be recognized by the state in perpetuity. If not, *i. e.*, if the state did not believe itself committed to restore and insure to Minor a definite amount of water in return for his conveyance of his claim against the state, why did the state subsequently, upon proof of its ability to furnish to Minor water sufficient to operate only three and one-half pairs of millstones, instead of the eight pairs of millstones specified in the agreement of September 1, 1842, pay to Minor on February 23, 1846, the sum of $2800 for "the damage sustained by the said Minor by the failure of the state to furnish the power • • • mentioned in said contract of September 1, 1842" (R. 47)? Why also did the state at the same time (February 23, 1846) confirm to Minor the water power conveyed as above noted and recite that the $2800 *plus the water power* should be in full liquidation of all of his

claims? The entire transaction is inconsistent with any theory except that the state felt itself bound to make settlement with Minor; that in settlement for the water power (as opposed to his claims for seizure of the saw-mill) the state intended to restore a part of the water power so seized and that in the event of any subsequent diminution of the water power so restored Minor or his successors would be entitled to compensation. The only possible answer of appellees to the foregoing proposition is that in return for Minor's valuable water power, mill race and land, all owned by him in fee prior to the coming of the canal, the state intended to grant and Minor intended to accept the right to use the canal water at the mere whim of the state, for a month, a year or a few years, depending upon when the state might elect to discontinue the canal. Every act of the parties was inconsistent with such an intention, and the only question left for determination, therefore, is as to the right of the canal commissioners to enter into an arrangement with Minor whereby the water power was to be enjoyed by them *jointly*. And the answer to that question is to be found in the *Middletown* case wherein the court expressly holds that the state's title in canal water created under almost exactly the same circumstances as the water in the case at bar, may be, and in that case was, one of joint ownership between the state and the successor in title of the original mill owner.

In order to vest in the state a fee simple title to lands for canal purposes "it would be necessary to show that a claimed occupancy by the state was an exclusive occupancy in order to bring the case within the letter of the proposition." *Smith vs. State*, 59 O. S. 278, 281.

In that case a basin had been constructed upon privately owned land adjoining the canal property. It was used "by persons navigating boats on the canal in lading, unlading, passing and turning." Occasionally boats of the board of public works used the basin for like purposes and from time to time engineers employed by the board caused the basin to be cleaned. The basin having ceased to be used for canal purposes, the state brought an action to recover the land from the then owner who claimed title from the original owner of the land occupied by the basin. In denying the state's claim the court used the following significant language, at page 283:

> "It was not the purpose of the Act nor was it the policy of the state, to take land of the citizen for public use without affording the owner an opportunity to make application for an appraisal, and upon appraisal being made as prescribed by statute to pay damages if any are assessed. It is clear, also, that the act contemplates such assertion of exclusive control as would put the owner on notice that the property had been taken by the state for its own, and incorporated as part of its canal system. * * * There was no time when Dixon, or his successors in title, could have had the benefit of the provisions as to appraisal, for, as already found, neither had notice of the intention on the part of the state to acquire the property under the statute."

So also in the *Middletown* case the court said:

> "We think it may be conceded, notwithstanding the reservation from the grant, that, if the occupancy of the state of this particular feeder and the land upon which it is located had been exclusive and in denial of the claimed rights of Abner Enoch, the occupancy by the state of this feeder would have amounted to an appropriation of Abner Enoch's lands and water rights and relegated

him, as to remedy, to a recovery of the value of his property and water rights, but the State of Ohio, during all this period, not only abstained from such occupancy as would appropriate the lands and water rights of Abner Enoch, but by its departmental construction affirmatively recognized his joint occupancy, so that the time, to this day, has not come when Abner Enoch, or his successors, could have the value of these property rights ascertained and compensation therefor awarded." (P. 450.)

We recognize that in *Elevator Co. vs. Cincinnati*, 30 O. S., 629; *Fox vs. Cincinnati*, 104 U. S. 783; *Hubbard vs. Toledo*, 21 O. S. 379, the right of the state to retain the canals for hydraulic purposes after their abandonment for navigation was doubted and that, in that connection this court in *Kaukauna Water Power Co. vs. Green Bay*, 142 U. S. 254, said:

> "In *Little Miami Elevator Co. vs. Cincinnati*, 30 O. S. 629, the right to lease surplus water for private use was recognized as an incident to the public use of a canal for the purpose of navigation; but it was held that such use was a subordinate one, and that the right to the same might be terminated whenever the state, in the exercise of its discretion, abandoned or relinquished the public use. It was doubted whether the state could, after abandoning the canal, as a public improvement, still reserve to itself the right to keep up a water power solely for private use and as a source of revenue. 'By so doing,' said the court, 'the water power would cease to be an incident to the public use, and the state would be engaged in the private enterprise of keeping up and renting water power after it ceased to act as a government in keeping up the public use.' The same ruling was made by this court in *Fox vs. Cincinnati*, 104 U. S. 783; (26:928) see also *Hubbard vs. Toledo*, 21 O. S. 379."

The state, however, actually has done that thing, *i. e.*, it has retained the canals for hydraulic purposes long after their use for navigation purposes has ceased. Having done so, the status of the state in respect of the canals can be nothing else than that of a proprietor, nor, in the face of the Act of April 9, 1902, 95 Ohio Laws 118, can it be said that the state has been acting *ultra vires* in retaining the canals as a proprietor for hydraulic purposes. By the terms of that Act the board of commissioners were expressly ordered to investigate all water contracts on the Miami and Erie Canal and to "revise and readust them upon a fair and equitable basis as to the rents to be paid in the future." (Brief on behalf of appellee, pp. 107-108.) This was done in the face of knowledge on the part of the legislature that navigation on the canal had already ceased. It was susceptible of but one interprettion, *viz.*: navigation being no longer the paramount purpose or even any purpose of the canal, and the generation of hydraulic power having become the paramount purpose, the legislature intended to recognize that fact by ordering the commissioners to revise the state's water contracts and make the most of them; in fact, the paragraph following the one above quoted requires that a special report be made to the next general assembly "as to what extent the rates for water rent may be increased." If such action of the general assembly did not give and was not intended to give legislative sanction to the changed conditions under which the state found itself to be the proprietor of a water power rather than the operator of a canal, we altogether misunderstand the meaning and effect of some fairly elementary language.

B. Contractual Versus Sovereign Rights:

If, as is consistently contended in the memorandum on behalf of appellants submitted since the oral argument, the alleged right of the state to discontinue the Minor water power rests in contract rather than in the sovereign power of the state, the complete answer is found in the admitted fact that the Minor grant contains *no right in the state to resume the water either for navigation purposes or otherwise.* True, the water is to be "applied at all seasons of the year except when otherwise necessary for navigation of the canal or when breaches occur, repairs become necessary and other unavoidable causes prevent." (R. 37.) But that is not the equivalent of a reservation in the state of the right to resume the water for navigation to the destruction of its use for hydraulic purposes. Rather, it is consistent with the idea that the water was to *remain* where it is, but that the volume necessary to turn Minor's millstones should not be used for that purpose if required for the purpose of navigation. So also the following provision of the Minor grant is equally consistent with appellee's contention that the state considered itself definitely obligated to furnish the water subject only to the limitation that it should not be done to the prejudice of navigation or the damage and injury of other adjacent mill owners and proprietors of water power:

> "Provided that nothing herein contained shall hold the State of Ohio *responsible* to furnish the above amount of water or any part thereof to the said party of the second part, to the damage and injury of mill owners and proprietors of water power on the Maumee River at, opposite and below the towns Providence and Gilead." (R. p. 37.)

Apart from that proviso, however, and subject to the necessities of navigation, the responsibility to furnish the water is plainly recognized.

As further reflecting upon the intention of the parties as expressed in their *contract* (the Minor grant, R. 38), the state agreed to erect and complete the regulating gate and weir via which the Minor water was to be taken from the canal. They were to be constructed of "stone walls of solid masonry and suitable timber and iron with the necessary embankments," all indicating that the state was contracting to insure *permanently* to Minor, his heirs and assigns, the equivalent of his previously-owned water power; all of it consistent with the idea of a *joint* ownership and use of the water; none of it consistent with appellants' theory that the state, by abandoning the canal, might wipe out the water power at will, notwithstanding the fact, plainly appearing from Stipulation Exhibits 1 and 2 (R. 37, 43), that neither Minor nor his successors in title have ever been paid for his original water rights except to the extent and in the manner shown by those exhibits. If the Act attacked in this case shall be enforced then those original rights will never be paid for.

CONCLUSION

In conclusion the following is submitted on behalf of appellee in the Providence Mill Company case (No. 675):

(1) Originally, Minor owned the water power in fee simple.

(2) Obviously, the only reason Minor failed to reserve the water power in the first instance (as was

done in the *Middletown* case) was because the state, by taking possession of the water without his consent, rendered such a reservation impossible.

(3) However, the state's taking of the water coupled with the concurrent *restoration* of a part of it to Minor in fee was the equivalent of the *reservation* of water power sustained in the *Middletown* case.

(4) The entire transaction shows that the parties (the state and Minor) intended the ownership of the water to be *joint*, as it was held to be in the *Middletown* case; it negatives the intention that the state's taking of the water was to be *exclusive*, as against Minor and in favor of the state, *i. e.*, that it was to be wholly owned by the state, in fee simple.

(5) The *Middletown* case definitely recognizes the right of the canal commissioners to acquire and hold a water power *jointly* with the original owner, *i. e.*, less than a fee simple exclusively in the state.

(6) The claim that Minor surrendered the water power (owned by him in fee simple) in return for a *temporary* water *lease* which the state might abrogate at will, is wholly untenable and inconsistent with the obvious intention of the parties.

(7) The grant to Minor was in no sense a *lease* notwithstanding the use of the words "lease" and "agreement" in two or three places; it was a definite grant of water in consideration of Minor's grant to the state; it employs the words "lease and convey" in the granting clause; at other points the words "leased," "leased and conveyed," "granted," etc. No rental is reserved to the state, and the instrument simply is not a lease at all, being an out-and-out grant, with words of perpetuity.

(8) To permit the state to destroy the water power and at the same time retain Minor's mill race and land, granted by him to the state in consideration of the water power, would be unconscionable. The state, as a grantee of property, has no right to destroy the consideration upon which the grant was made. *Cleveland Terminal, etc., Co. vs. State*, 85 O. S. 251.

Respectfully submitted,

U. G. Denman,
Karl E. Burr,
Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES.

No. 675.—October Term, 1928.

Harry J. Kirk, as Superintendent of Public Works and Director of the Department of Highways and Public Works of the State of Ohio, etc., et al., Appellants, *vs.* The Providence Mill Company.	Appeal from the District Court of the United States for the Southern District of Ohio.

[June 3, 1929.]

Mr. Justice Stone delivered the opinion of the Court.

This is a direct appeal, under § 266 of the Judicial Code, from a final decree, following an interlocutory decree, of a district court of three judges for southern Ohio, enjoining appellants, the state director of highways, the superintendent of public works of Ohio, and county commissioners, from draining or otherwise interfering with the flow of water in a section of the Miami & Erie Canal, in such manner as to interfere with the rights of appellee to take surplus water under a grant from the state to appellee's predecessor in interest. — F. (2d) —. The questions presented are the same as those in No. 674, *Kirk* v. *Maumee Valley Electric Company*, *ante*, p. —, decided this day, the only difference being in the nature of the grant under which appellee derives its rights to the water.

The grant here involved is embraced in an indenture of September 1, 1842, between the commissioner of the Board of Public Works and one Minor, as readjusted on February 23, 1846. By it Minor, a riparian owner, released and quit claimed to the state all claims against it arising out of the use and occupation by the state of water from the Maumee River and of lands used in the construction and operation of the Wabash & Erie canal, now the Miami & Erie. This release was made in consideration of a perpetual

grant by the state, made after the passage of the Act of March 23, 1840, 38 O. L. 87, discussed at length in our opinion in No. 674, *Kirk* v. *Maumee Valley Electric Company, supra*. By the grant the state sold and conveyed a specified quantity of water "except when otherwise necessary for the navigation of the canal" and the contract as readjusted was similarly restricted. The grant was subject to the limitations of the Statute of 1840, and the rights conferred under it did not, for present purposes, differ from those considered in No. 674. They were likewise subject to the reserved power of the state to abandon the canal and devote it to other purposes, which was exercised by the Act of the Ohio Legislature of May 11, 1927, 112 Ohio Laws 350. For the reasons discussed at length in No. 674, and equally applicable here, the judgment below is

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.